Petition

No. 81-155

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In the Supreme Court of the United States

October Term, 1980

BOARD OF TRUSTEES OF INSTITUTIONS
OF HIGHER EDUCATION, ET AL.,
Petitioners,

vs.

MISSISSIPPI COUNCIL ON HUMAN
RELATIONS, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals applied the correct standard of review in holding that the Board of Trustees was guilty of employment discrimination with respect to the individual claim of Cornell Green Rice, since she did nothing more than make an application with that state agency, and more is required. *Texas Department of Community Affairs v. Burdine,* ..... U.S. ....., 101 S.Ct. ....., 67 L.Ed.2d 207 (1981); *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

II.

Whether the Court of Appeals was correct in reversing the district court's refusal to certify the alleged class with respect to the Board of Trustees ("College Board") when the record clearly indicates a delay of two and one-half (2 1/2) years before an effort was made to show the existence of a class. *East Texas Motor Freight v. Rodriguez,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this case (a consolidated appeal) on February 23, 1981.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Mississippi, which is unreported, is set out in the appendix, *infra*, p. A1. The opinion (consolidated appeal) of the United States Court of Appeals for the Fifth Circuit is reported at 637 F.2d 1014, and is set out in the appendix, *infra*, p. A18.

JURISDICTION

The judgment of the Court of Appeals was entered on February 23, 1981 (App., *infra*, p. A18). A timely petition for rehearing was denied on April 27, 1981. The Jurisdiction of this Court rest on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cause involves the Fourteenth Amendment to the United States Constitution; 42 U.S.C. §§ 1981, 1983; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

STATEMENT OF THE CASE

The petitioner is the central office of the Board of Trustees of State Institutions of Higher Learning, a constitutional body and the governing authority of the public university system of the State of Mississippi. Mississippi Constitution of 1890, § 213A, as amended; Mississippi Code of 1972, § 37-101-1 et seq.[1] At the time this litigation began, the staff of the Board's office consisted of the Executive Secretary and Director, Mississippi Code of 1972, § 37-101-7, and approximately eighteen (18) educational and financial analysts and clerical workers in Jackson, Mississippi. The cause of action concerns employment practices at the Board office only, and not the statewide system of higher education. 637 F.2d 1014, 1018.

This action was filed by the Mississippi Council on Human Relations, Barbara Phillips, Cornell Green Rice

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1. The caption of the published opinion, 637 F.2d 1014 is incorrect in its designation of this agency-defendant.

and Melvin Phillips alleging racial discrimination in the employment practices of the particular state agency. The litigation was filed as a class action pursuant to the provisions of 42 U.S.C. §§ 1981, 1983 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. These plaintiffs sought injunctive and declaratory relief because of alleged impermissible hiring practices, back wages, damages, the establishment of a preferential hiring schedule for the Board of Trustees' office, costs and attorney's fees.

Procedurally, the complaint was filed on December 22, 1975. Discovery was effected by both parties. The plaintiffs did not move the Court for a certification of the proposed class until July 21, 1978, just days before the pre-trial conference scheduled for July 25, 1978, and as a matter of record, two and one-half (2 1/2) years after the complaint was filed. After considering the motion, memoranda, and hearing arguments of counsel, the Court denied the request stating that: (1) numerosity was absent as required by Rule 23(a) (1), F. R. Civ. P., (2) that these plaintiffs failed to show that they could "fairly and adequately represent" the class membership according to Rule 23(a) (4), and (3) that it was apparent that the strictures of Rule 23(c) (1) had not been met because,

> "Counsel for the plaintiff [sic] could offer no reason for the delay in moving for Class Certification or for the eleventh-hour nature of the request."

Therefore,

> "In light of these considerations, and taking into consideration the other factors present in this case, the request that this case proceed as a class action was denied. *See* East Texas Motor Freight v. Rodriguez, 431 U.S. 395 (1977)." Memorandum Opinion, App. p. A1.

On August 14, 15, 1978, a two (2) day trial was had in this case. By Memorandum Opinion dated July 9, 1979, the district court determined that the plaintiffs had not overcome the initial burden of indicating that a prima facie case of invidious discrimination in employment practices had incurred due to the acts of the defendants. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975); *McDonnell-Douglas Co. v. Greene*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Relief pursuant to § 1981 was refused because of plaintiffs' failure to prove purposeful and intentional discrimination. *Williams v. DeKalb County*, 582 F.2d 2 (5 Cir. 1978). Nor were these plaintiffs entitled to any judicial assistance under § 1983 either; they did not meet the clear teachings of *O'Conner v. Donaldson*, 422 U.S. 563, 577, 95 S.Ct. 2486, 45 L.Ed.2d 396, 408 (1975).

On appeal the Circuit Court reversed the district court's refusal to certify the alleged class, because ". . . the [district] court went too far in both cases." According to the opinion of the Court of Appeals, 637 F.2d 1014, 1023:

> "Neither *East Texas Motor Freight* nor any other precedent that we have found has held that delay in moving for certification is sufficient in itself to disqualify a party as a class representative."

The district court's denial of class certification was predicated upon the dictates of Rule 23(c)(1) that the class should be certified "as soon as practicable" after the commencement of the action, the burden being on the moving party. However, the Court of Appeals stated otherwise: "Rule 23(c)(1) is cast as a command to the district court, not the parties, . . ." 637 F.2d 1014, 1022, footnote 9.

The Court of Appeals affirmed the district court's judgments as to the individual claims of the plaintiffs with the exception of Cornell Green Rice.

> "The district court found that Rice was not hired because there were no vacancies when she applied. This is clearly erroneous. The evidence shows that Bonnie Childers, a white, was hired as a secretary scarcely two months after Rice's application. The defense made no attempt to show that Childers was better qualified than Rice, and there is no indication of how long the vacancy she filled had existed." 637 F.2d 1014, 1030.

REASONS FOR GRANTING THE WRIT

When the Court of Appeals held that the Board of Trustees was guilty of employment discrimination when it could not show that one applicant was *more qualified than another,* that Court placed an added and impermissible burden on the petitioner. An incorrect standard of review was utilized by the appellate court. When the moving parties, by and through their attorneys, did not move for a certification of their alleged class until after two and one-half (2 1/2) years had lapsed, and then at the pre-trial conference, an undue burden was placed on the defending party. The Court of Appeals opined that it is the burden of the district court, not the moving party who bears the responsibility of class certification.

Certiorari should be granted in this case because the opinion of the United States Court of Appeals for the Fifth Circuit in this employment discrimination case is contra to both the language and spirit of Rule 23(c)(1) and recent case authority from this Court.

ARGUMENT

I.

The Court of Appeals Applied the Incorrect Standard of Review When It Held the Board of Trustees Guilty of Employment Discrimination of an Individual's Claim When the Person Did Nothing More Than Submit an Application and Case Law Mandates More Is Required

The United States Court of Appeals for the Fifth Circuit was in error when it found that the plaintiff Cornell Green Rice was entitled to judgment. In so holding, that Court did not apply the correct standard of review. According to its opinion, the appellate court observed (1) that Rice had made an application with the state agency and (2) that "[T]he defense made no attempt to show that [another applicant] was better qualified than Rice . . ." 637 F.2d 1014, 1030.[2]

The act of mere application is insufficient to show *intentional* discrimination as required by *Texas Department of Community Affairs v. Burdine*, ... U.S. ....., 101 S.Ct. ....., 67 L.Ed.2d 207 (1981). *Burdine* clearly holds that the employer in a Title VII action *does not* have to shoulder a burden of proving that "the person hired . . . was more qualified than the plaintiff." 67 L.Ed. 207, 217-218. The applicant must prove more, that is, that she did everything in her power to seek employment. *Furnco*

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2. The Court observed that both applications were on file. 637 F.2d 1014, 1030, footnote 47. This conclusion is based on unverified assumptions. Such a foundation is certainly insufficient; ". . . [N]o one can be required, consistent with due process to prove the absence of violation of the law." *Norwood v. Harrison*, 413 U.S. 455, 471, 93 S.Ct. 2804, 37 L.Ed.2d 723, 735 (1973).

Construction Corp. v. Waters, 438 U.S. 567, 576, 98 S.Ct. 2943, 57 L.Ed.2d 957, 967 (1978).

Further, the Court of Appeals' conclusion that the district court's ultimate finding of nondiscrimination was not subject to the "clearly erroneous" rule of F. R. Civ. P. 52(a) is contrary to the plain language of the Federal Rules of Civil Procedure.

The substantiality of these arguments is apparent in view of this Court's recent decisions vacating and remanding decisions by (the Fifth Circuit) for further consideration in light of *Burdine, supra*: *Johnson v. Uncle Ben's, Inc.*, 623 F.2d 419 (5th Cir. 1980), *vacated and remanded*, 49 U.S.L.W. 3787 (U.S. Apr. 20, 1981) (No. 80-1420), and *Falcon v. General Telephone Co.*, 626 F.2d 369 (5th Cir. 1980), *vacated and remanded*, 49 U.S.L.W. 3743 (U.S. Apr. 6, 1981) (No. 80-1264). In addition, this Court has recently granted certiorari in a case from the Fifth Circuit which raises the issue of whether the district court's findings of fact in an employment discrimination case are subject to review by the court of appeals under the "clearly erroneous" rule of Fed. R. Civ. P. 52(a), *Swint v. Pullman-Standard*, 624 F.2d 525, 533 n.6 (5th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3788 (U.S. Apr. 20, 1981) (Nos. 80-1190 & -1193) (certiorari granted limited to question one presented by each petition; question one in petition in No. 80-1193, *United Steelworkers v. Swint* is: "Is federal court of appeals bound by 'clearly erroneous' rule of Fed. R. Civ. P. 52(a) in reviewing district court's findings of fact, arrived at after lengthy trial, as to motivation of parties who negotiated seniority system?" 49 U.S.L.W. at 3648).

II.

The Decision of the Court of Appeals As to Class Certification Is Erroneous Because It Is in Conflict With Clear Principles Announced by the Court

The United States Court of Appeals for the Fifth Circuit was in error when it reversed the district court's refusal to certify the alleged class of plaintiffs against the Board of Trustees. In its Memorandum Opinion (Appendix, p. A1), the district court, as trier of fact observed that there had been a substantial delay of approximately two and one-half (2 1/2) years delay before the plaintiffs had brought forth their motion for class certification:

> "The plaintiffs made no attempt to seek certification of their alleged class until the date of the pre-trial conference, July 25, 1978, over two and one-half years after the suit was filed. At that point this cause was one of the oldest non-jury cases on this Court's entire docket, and the proposed class action nature of the suit gave every indication of removing this action from a trial posture, and delaying further proceedings in the cause until quite some time in the future, given this Court's crowded docket. Counsel for the plaintiff could offer no reason for the delay in moving for Class Certification or for the eleventh-hour nature of the request. In light of these considerations, and taking into consideration the other factors present in this case, the request that this case proceed as a class action was denied. See *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977)."

In reversing, the Court of Appeals predicated its conclusions on two (2) bases. First, at the time of this litigation there was no local rule extant placing a time limitation on the movant to seek class certification, 637 F.2d 1014,

1023, footnote 11. Secondly, and more importantly, that Court stated, 637 F.2d 1014, 1022:

> "Rule 23(c)(1) commands the district court to decide whether to certify a class in any case 'as soon as practicable' after the commencement of the action.[9]"

Such an analysis is contrary to both the spirit and language of F. R. Civ. P. 23(c)(1). In *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 405-406, 97 S.Ct. 1891, 52 L.Ed.2d 453, 463, this Court held:

> "We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. *The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.*"

The facts of this case and *Rodriguez* are not dissimilar. In *Rodriguez*, the plaintiff did not move for certification until trial, even though the litigation was prolonged. In this case the record indicates that the case was two and one-half (2 1/2) years old, and ample discovery was taken to develop proof required by Rule 23(c)(1). It was the plaintiffs' responsibility to move for class cer-

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[9]. Rule 23(c)(1) is cast as a command to the district court, not the parties; hence, a district court has an obligation to make the determination on its own if necessary. (citations omitted)."

tification. *Rodriguez* stands for the proposition that ". . . the named plaintiff's failure to protect the interests of class members by moving for certification bears strongly on the adequacy of the representation . . ." 431 U.S. 395, 405.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ed Davis Noble, Jr., Assistant Attorney General for the State of Mississippi and one of the attorneys for the Petitioners do hereby certify that I have this day, served a true and correct copy of the foregoing Writ of Certiorari, to the following:

Nausead Stewart, Esquire
Lawyers' Committee for Civil Rights
Under Law
Post Office Box 1971
Jackson, Mississippi 39205

This, the 23rd day of July, 1981.

ED DAVIS NOBLE, JR.

Appendix

APPENDIX

(Filed July 10, 1979)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. J76-216(N)

THE MISSISSIPPI COUNCIL ON HUMAN RELATIONS, et al.
PLAINTIFFS

vs.

THE BOARD OF TRUSTEES OF STATE INSTITUTIONS OF HIGHER LEARNING, et al.
DEFENDANTS

MEMORANDUM OPINION

The plaintiffs in this case, the Mississippi Council on Human Relations, Barbara Phillips, Melvin Phillips and Cornell Green Rice, have filed this action pursuant to 42 U.S.C. §1981, 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., alleging racial discrimination in employment practices by the defendants, the Board of Trustees of State Institutions of Higher Learning (the Board), its membership and staff. The litigation was filed as a class action in which the plaintiffs proposed to represent all past and future black applicants for employment at the office of the Board. They seek permanent injunctive and declaratory relief against these alleged discriminatory hiring practices, back wages, certain damages, the establishment of preferential hiring of Board office personnel, costs of litigation and attorney's fees. This Court has jurisdiction of this action under 28 U.S.C.

§1343, and 28 U.S.C. §2201, 2202. The case proceeded to trial before the Court and this Memorandum Opinion constitutes the Court's findings of fact and conclusions of law based on the evidence adduced.

Findings of Fact

This action is one of a series of employment discrimination suits filed by these same plaintiffs against state agencies. *See Barbara Phillips v. The Joint Legislative Committee on Performance Evaluation and Review of the State of Mississippi,* Civil Action No. J76-114(C) (S.D.Miss. 1979); *Barbara Phillips v. The State of Mississippi Agricultural and Industrial Board,* Civil Action No. J76-117(C) (S.D.Miss. 1979); *Mississippi Council on Human Relations v. State of Mississippi,* Civil Action No. J76-118(R) (S.D. Miss.). Two of the above cases have been tried before a United States Magistrate, and in both cases he found, in an Opinion and in a Report and Recommendation, that the plaintiffs had failed to prove their case against the defendant state agency.

The defendant in the case *sub judice* is the Board of Trustees of State Institutions of Higher Learning, a constitutional body and the governing authority of the university system of the State of Mississippi. Miss. Constitution of 1890, §213A, as amended Miss. Code Ann. §37-125-1 (1972). The individual defendants were at all times serving in the following official capacities; Dr. Verner S. Holmes, as President of the Board of Trustees; Boswell Stevens, Neal Denton Rogers, Dr. Robert H. Harrison, Charles C. Jacobs, Jr., Dr. John R. Lovelace, Travis E. Parker, W. M. Shoemaker, Mrs. Miriam Q. Simmons, Mrs. Betty H. Williams and Robert L. Shemwell, Jr., as members of the Board of Trustees. (Mr. Shemwell was the LaBauve Fund Trustee, who died before the trial of this cause, and the

Governor had not appointed his successor as of the date of the trial.) Dr. E. E. Thrash was serving as Executive Secretary and Director of the Board of Trustees. These individual defendants were at all times acting under color of the laws, customs and authority of the State of Mississippi.

At the pre-trial conference of this cause held July 25, 1978, the plaintiffs presented their Motion for Class Certification which was denied for the reason that the plaintiffs did not prove they could adequately represent the class, in light of their failure to comply with the language or the spirit of F.R.Civ.P. 23(c)(1), which requires that the putative class be determined as soon a practicable after the commencement of the action. The plaintiffs subsequently asked the Court to reconsider this ruling, and to allow the action to proceed as a class action, but for the reasons outlined below the Court refuses to do so.

This Title VII action was initially filed in the United States District Court for the Northern District of Mississippi on December 22, 1975. Shortly thereafter the defendants filed a Motion for a Change of Venue pursuant to 28 U.S.C. §1404(a), asking the Court to transfer the case to this Court, and on July 8, 1976 this Motion was granted and the cause was transferred to the Southern District of Mississippi, Jackson Division and received its present civil action number.

On February 3, 1976 the plaintiffs filed a Motion for an Extension of Time in Which to Certify the Class, which was granted, but since that initial request, they have had more than ample time in which to investigate and present this Motion for class certification. On February 2, 1976, the day before the extension of time mentioned above, the plaintiffs filed their First Set of Interrogatories. In De-

cember of 1976 they filed a Motion for Extension of Time for Discovery, which was granted by the United States Magistrate until February 28, 1977. The plaintiffs propounded their Second Set of Interrogatories on March 17, 1978. The plaintiffs made no attempt to seek certification of their alleged class until the date of the pretrial conference, July 25, 1978, over two and one-half years after the suit was filed. At that point this cause was one of the oldest non-jury cases on this Court's entire docket, and the proposed class action nature of the suit gave every indication of removing this action from a trial posture, and delaying further proceedings in the cause until quite some time in the future, given this Court's crowded docket. Counsel for the plaintiff could offer no reason for the delay in moving for Class Certification or for the eleventh-hour nature of the request. In light of these considerations, and taking into consideration the other factors present in this case, the request that this case proceed as a class action was denied. See *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977).

As noted above, we found that the plaintiffs had not demonstrated that they could adequately represent the interests of the proposed class since they had not complied with the requirements of F.R.Civ.P. 23 (c)(1), which requires that the proposed class be determined "as soon as practicable after the commencement of an action." After careful consideration, we are still of the opinion that the Motion for Class Certification was properly denied, and therefore will proceed to consider the claims of the individual plaintiffs. Of course, any claims the Council on Human Relations might have must rise or fall with those of the named plaintiffs.

Barbara Phillips is a black female who completed undergraduate school at Macalister College, St. Paul, Min-

nesota in June, 1971, with a major in history. After her graduation she worked as a volunteer in a political campaign in Mississippi, and then went to work with the Emergency Land Fund in November, 1971, where she prepared reports dealing with real estate and property tax reform. Ms. Phillips worked with the Emergency Land Fund until September, 1973, when she enrolled at Northwestern University School of Law, Chicago, Illinois for the academic year 1973-74.

In June, 1974, Ms. Phillips came into contact with the Mississippi Council on Human Relations and its then director, Michael Raff, who was interested in the hiring practices of state agencies. Raff provided Ms. Phillips with a list of state agencies that he described as having all white personnel and paid her $50.00, whereupon Ms. Phillips applied for employment with the state agencies Raff had suggested, and subsequently filed charges of discrimination against seven or eight of the state agencies.

Ms. Phillips went to the receptionists' desk of the Education and Development Center, on the first floor of the building, and acquired an application on or about July 9, 1974. The Education and Development Center is the designation of a complex which includes the Mississippi Authority for Educational Television, the Mississippi Research and Development Center, and the Universities Center. The defendant Board's office is also in this series of buildings, and is housed on the ninth floor of the central building. Ms. Phillips took the application home, filled it out and mailed it back to the Education and Development Center.

The application in question is entitled "Mississippi Classification Commission, State of Mississippi, Application for Employment" and is apparently the standard form for application for employment with state govern-

ment. In filling out the form, the state agency applied for was indicated to be the "College Board," a common synonym for the Board of Trustees of State Institutions of Higher Learning. In addition, in completing segment 10, entitled "Employment Record . . . Description of Duties," the following description of Ms. Phillips' employment experience appears:

> Development of research projects using primary and secondary sources. Director of study on property tax subsequently published by the Center. Interviewing clients with land problems and developing situations for each specific problem. *Reason for leaving*: To attend law school.

As noted above, Ms. Phillips mailed this application back to the Education Center, and never contacted or attempted to contact the Board office either by letter, telephone or in person.

The application reached the Board office by intra-agency mail, and based on the information contained on the application, on July 22, 1974, Dr. E. E. Thrash, Executive Secretary and Director of the Board of Trustees, wrote the following letter to Barbara Phillips:

> This is to acknowledge receipt of your application for employment with the College Board. This was forwarded to us by the Mississippi Research and Development Center which is an agency under the governance of the Board of Trustees.
>
> The Board of Trustees has a very small staff of 18 people. We do not have a vacancy on our staff at the present time which calls for the extent of professional training which you have in the study of law. May I suggest that you forward your credentials to

the University of Mississippi. There may be an opportunity in connection with the law school there for someone with your capabilities.

Our best wishes to you for a good year.

(Exhibit P-14).

That same day, July 22, 1974, the Mississippi Council on Human Relations filed a third party charge of discrimination against the Board with the Equal Employment Opportunity Commission.

In September, 1974, without further contacting the defendants about employment, Ms. Phillips returned to law school at Northwestern University, from which she received her law degree in June, 1976. The Board has no staff attorney, and has no positions associated with a law degree, since by statute all legal matters of the Board are handled by the Office of the Attorney General of the State of Mississippi. Miss. Code Ann. §7-5-1 (1972). Since the time of her application to the Board, Ms. Phillips' entire professional activity has been in the area of the practice of law.

Although the Board oversees the operation of many state agencies concerned with higher education, as well as the institutions of higher learning themselves, the directors of those agencies handle their own employment activities, although the Board has final approval over all hiring. As a practical matter, the Board office is concerned with the hiring the Board staff, which as Thrash indicated in his letter to Barbara Phillips, had only 18 employees at the time the plaintiffs were seeking employment in 1974. Dr. Thrash is also personally concerned with hiring the maintenance staff of the Education complex, but none of the named plaintiffs have applied for

or indicated any intention to apply for one of these positions.

Prior to the fall of 1974, no black had ever applied for a position on the Board, and the Board had no black employees. As early as late 1972 and 1973 Dr. Thrash and Dr. Robert W. Harrison, a black member of the Board, had discussed the desirability of encouraging blacks to apply for positions on the Board staff, and to that end Dr. Harrison had unsuccessfully spent a great deal of time trying to encourage blacks to apply for such positions. Thrash had contacted Alcorn State University and Jackson State University, two predominantly black state universities, seeking black applicants for positions on the Board staff, but it was not until the fall of 1974 that these efforts bore fruit, as will be outlined below.

Although the chart depicting the dates of hiring and separations of employees on the Board staff indicated that a clerk's position was open at the time of Mrs. Phillips' application, Dr. Thrash said that the date of separation in question was incorrectly listed, and that the employee in question, Wendy Anderson, had in fact worked on the Board staff during the period the plaintiff was interested in employment with the Board. Therefore the Board staff did not have a vacancy at the time the plaintiff Barbara Phillips applied.

In Dr. Thrash's opinion this plaintiff's history major and one year of law school did not qualify her for any of the Board's technical positions, which on the whole involved the financing of higher education.

Thrash described the hiring process for the staff, which he mentioned was somewhat irregular in light of low turnover. After an applicant presents himself or herself to the Board office as a potential employee, they are referred to

Dr. Coffman, the Associate Director, or Dr. Thrash. The applicant is then told to fill out a standard Mississippi Classification Commission application form for employment in state government, which is then given to Thrash for examination. If there is a vacancy on the staff, and if Dr. Thrash feels the applicant is qualified for any position available, the applicant is asked to come in for an interview, followed by examination of transcripts, records and references. If Dr. Thrash feels the applicant is desirable, and a job is available, the applicant is then offered a job. No one is refused an application form by the Board, and Dr. Thrash vigorously denied any discrimination against applicants on the basis of race.

In the fall of 1974 the efforts to attract black staff members was stepped up as the Board began to gear up for the increased activity that the beginning of the academic year would produce. There were openings in the staff at that time, and through Dr. Peoples, the President of Jackson State, and Dr. Washington of Alcorn State, two black employees were hired, namely Andre Curry and Eunice Avent. These two black employees were hired in September, 1974 to begin work on October 1, 1974, and their hiring took place just prior to the plaintiffs Melvin Phillips and Ms. Rice contacting the Board.

The only other employee hired by the Board during this period was Ward Shaw, a white male, who applied on September 17, 1974 and was hired September 18, 1974. In addition to having completed one year of law school, this employee had an extensive background in economics, with a Master's degree in that subject, and had been employed as a college instructor. He was hired as a temporary employee by the Board under a federal grant to hire the unemployed. At this time Dr. Thrash was interested in finding ways to attract more white students to Alcorn State

University in order to accelerate the desegregation of that school, and he hired Mr. Shaw to investigate the feasibility of instituting an optometrist school and a school of mortuary science at Alcorn. Shaw was hired because of his background in cost analysis and finance, which was the key question in the investigation into the practicality of establishing the two new schools at Alcorn State.

The plaintiff Melvin Phillips is a black male who received a degree from Tougaloo College in 1973, with a major in political science. After his graduation Mr. Phillips was involved in educational counseling, with research in the area of student discipline and student rights. Prior to this contact with the defendant, Phillips had also received $50.00 from Michael Raff of the Council on Human Relations, and was instructed by Mr. Raff where to apply for a job. On or about September 6, 1974, Mr. Phillips testified that he called the Board office and talked to Dr. Coffman, and that he subsequently went to the Board office and again talked to Dr. Coffman. Phillips did not fill out an application, and in fact there is no record of his having applied for employment, which he explains was because the secretary at the defendant's office told him that there were no application forms available. According to Phillips, Coffman told him that there were no job openings with the defendant at that time, but took his name, address, phone number and other information; however Phillips says he was never contacted by Coffman.

The person Phillips states that he talked to was Dr. Charles Coffman, Associate Director of the Board, who received a B.B.A. degree from Delta State University, a Master's degree from the University of Southern Mississippi and a doctorate from the University of Mississippi. He is a past staff member of the National Board of Laity of the United Methodist Church, and is one of the two indi-

viduals at the Board office to whom Dr. Thrash has delegated the authority to receive applications and conduct interviews. He does not remember talking to Melvin Phillips, either on the phone or in person.

The ease with which Ms. Phillips obtained an application from the receptionist in the lobby of the Education Center complex indicates to the Court that these applications were not difficult to obtain. Thus the Court is at a loss to explain the absence of any record of Melvin Phillips' contact with the Board office, and is not sure that his efforts were enough to qualify him as a bona fide applicant for employment. This plaintiff did not know of an opening on the Board staff, did not state that he applied for any certain position on the staff, and in fact no one at the Board office recalls having any contact with him. When faced with a credibility decision between a witness of the caliber of Dr. Coffman, who says he has no memory of any contact with the plaintiff, and the story of the plaintiff, an unimpressive witness at best, the Court has little difficulty in discounting Phillips' story to the extent it conflicts with what Dr. Coffman said.

The plaintiff Cornell Green Rice is a black female who has a degree in business education from Mississippi Valley State University, and has worked as a teacher as well as working for the Lawyer's Committee for Civil Rights Under Law in the summer of 1974. Prior to initiating contact with the defendant, Ms. Rice likewise counseled with Mr. Raff, received her $50.00 and his suggestions as to which state agencies to apply to for employment. On September 19, 1974 she went to the Board office to apply for a position and talked to Dr. Thrash, who told her that there were no positions available and that two blacks had been hired the previous day to join the staff October 1, 1974. Ms. Rice states that she was given an application which she com-

pleted and filed, but was never subsequently contacted. She now lives in Maryland with her husband, who works for the Children's Defense Fund in Washington, D.C., at a salary of approximately $29,000 per year.

Dr. Harrison, a black member of the Board since May, 1972, testified that Dr. Thrash helped him initiate the move to find qualified black employees for the Board staff. In the last part of 1973 or early 1974, Dr. Harrison had approached Ms. Rice and urged her to apply at the Board office for employment on the staff, since he knew Ms. Rice and her family. This plaintiff told Dr. Harrison that she was not interested in a job at the Board office because she was employed making more money at her present job than she could make at any job the Board could offer her. However she applied at the Board office as noted above, and is now charging that she was not hired because of her race.

Conclusions of Law

The Court has jurisdiction of this cause and the parties therein, and the plaintiffs have satisfied all of the jurisdictional requirements under 42 U.S.C. §1981, §1983 and §200e et seq., including all the applicable statutes of limitation.

In order to prevail in a Title VII employment discrimination case, the plaintiffs must first establish a prima facie case of racial discrimination by meeting the criteria outlined in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973), by showing that (1) they belong to a racial minority; (2) they applied and were qualified for a job for which the employer was seeking applications; (3) that despite their qualifications they were rejected; (4) after their rejection the position remained open and the employer continued to

seek applications from persons of plaintiffs' qualifications. If the plaintiffs fail to prove a prima facie case the defendants are entitled to prevail; however if a prima facie case is made, the burden shifts to the defendant to prove by a preponderance of the evidence some legitimate nondiscriminatory, and job-related reason for its failure to employ the plaintiffs. If the defendant fails to articulate a job related and legitimate reason for its failure to employ the plaintiffs, they are entitled to prevail. Once the defendant does carry its burden in this regard, then the plaintiff must prove by a preponderance of the evidence that the reasons articulated by the defendant are mere pretexts for actual racial discrimination on the part of the defendant. 411 U.S. at 802-805, 93 S.Ct. at 1825. *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977); *Causey v. Ford Motor Co.*, 516 F.2d 416, 420 n.6 (5th Cir. 1975).

In order to prevail under the Civil Rights Act, 42 U.S.C. §1981, the plaintiffs must prove purposeful and intentional discrimination. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Williams v. DeKalb County*, 582 F.2d 2 (5th Cir. 1978). Applying these standards to this action, this Court finds that the plaintiffs have failed to prove their §1981 claims, since they have utterly failed to prove any trace of purposeful and intentional discrimination on the part of the defendants. In fact the efforts of Drs. Harrison and Thrash to inform potential black applicants of openings on the Board staff, and to recruit qualified blacks for the staff, both through word of mouth and contact with predominantly black universities, long before the time of the plaintiffs' contact with the Board, indicate just the opposite. In addition, the plaintiffs has failed to offer any evidence that the defendants or any of them have in any way violated §1983, or any of the plaintiffs' constitutional rights. Therefore

the plaintiffs are not entitled to prevail on these causes of action.

Turning to the plaintiffs' Title VII claims, the Court finds that the plaintiff Cornell Green Rice has not proved a prima facie case against the defendants under the *McDonnell Douglas* standard, inasmuch as she has not proved that there was an opening on the Board staff at the time she talked to Dr. Thrash, she has not proved that the defendants were seeking any applicants at the time she applied, and she has not proved that the defendants continued to seek applications after she was not offered a job. This very plaintiff was approached by Dr. Harrison and urged to seek employment at the Board, but declined, only to later sue the Board for employment discrimination. In fact we find that racial discrimination played no part in this plaintiff's unsuccessful attempt to obtain employment by the Board, because on the previous day the Board had hired two black employees. Therefore the defendants are entitled to prevail in regard to the Title VII claims of this plaintiff.

The plaintiff Barbara Phillips has also failed to prove a prima facie case of a violation of Title VII. The testimony of Dr. Thrash was uncontradicted that there was no opening on the staff at the time Ms. Phillips applied. All any of the plaintiffs have proved is that they approached the Board inquiring about jobs and were not hired, and the plaintiff Melvin Phillips has not even left any evidence of his visit. None of the plaintiffs have proved that the Board was interested in or attempting to hire new staff members at the time they applied. None of them have proved that they were qualified for a particular position, other than file clerk, and none of them had any particular expertise or training which would have been of use to the Board in its task of managing the affairs of the Board of Trustees.

Even if Ms. Phillips was viewed as having made out a prima facie case, Dr. Thrash explained at length why he did not feel that she was qualified for any position on the staff other than file clerk. It was his impression that the plaintiff's area of expertise, if any, was in law or property tax reform, and this, when viewed in light of the plaintiff's history major, was not a combination of talents which the Board staff had a need for. The Court accepts Dr. Thrash's explanation that even if any position other than file clerk had been available, Barbara Phillips would not have been hired because of the above reasons.

Since nobody connected with the Board talked to Ms. Phillips or had any personal contact with her, it is hard for the Court to see how the Board could have had any idea what Ms. Phillips race was before Dr. Thrash wrote her telling her there were no openings. The requirement contained in *McDonnell Douglas* that the plaintiff apply for and be qualified to hold a job for which the employer is seeking applications imposes some responsibility on the plaintiff to make legitimate inquiries and applications to the employer, letting the employer know of the applicant's availability and desire for a job. It does not allow a plaintiff to make the most perfunctory and superficial contact with an employer and then rush off without more to file a charge of discrimination.

The plaintiff Melvin Phillips has also failed to prove a prima facie case, because he has not proved that his efforts to gain employment with the Board were such that he should be considered a bona fide applicant. No one connected with the Board can remember having any contact with this plaintiff, and since he left no application with the Board it is difficult to determine just what the extent of his efforts to find employment with the Board were. The initial burden of proving a prima facie case

is on the plaintiff, and the only evidence in this regard is the testimony of the plaintiff himself. Since we have attached little credibility to this plaintiff's testimony, the Court does not view his testimony, standing alone, as sufficient to prove a prima facie case of racial discrimination in employment. The Court believes the defendants when they say they have never refused an application to anyone, and we do not believe that any sort of initiative on the plaintiff's part would have failed to result in his obtaining an application. As Ms. Phillips demonstrated, all he had to do was ask the receptionist in the lobby of the Education Complex, or any other state agency for that matter.

Melvin Phillips did not prove that he was as qualified as the man who was hired to perform the study described above in connection with Alcorn State, since Ward Shaw had a Master's degree in Economics. In addition, the next two employees hired a short time later were black. So even assuming that he had made a prima facie showing, the fact that the next employee hired was obviously more qualified than the plaintiff and the two employees hired immediately thereafter were black constitutes proof by the preponderance of the evidence the reason for not hiring Melvin Phillips was legitimate and non-discriminatory.

The plaintiffs charge that the hiring of these two black employees was prompted by the discrimination charge filed by Mrs. Phillips. However the Court rejects this contention since the testimony of Dr. Thrash and Dr. Harrison shows that the Board had been interested in hiring blacks for some time prior to the time the plaintiffs contacted the Board. In any event the Court is not inclined to put much credence in this questioning of the Board's motives when it comes from people who seem to have been more interested in litigation than employment.

All of the plaintiffs received a sum of money before they approached the Board; one of the plaintiffs filed a charge of discrimination on the same day she received a letter from the Board telling her there were no openings, although no one at the Board had any way of knowing her race; one of the plaintiffs was specifically asked to apply for a job with the Board by one of the Board members, but refused; and the other plaintiff wasn't serious enough about employment with the Board to get a state employment application form and fill it out.

In *Furnco Const. Corp v. Waters*, 98 S.Ct. 2943 (1978), the Supreme Court stated that the issue in these cases is whether the employer was treating anyone less favorably because of their race, and the record does not indicate that the Board was guilty of this behavior. The record is filled with references to the efforts of the Board leadership toward affirmative action to hire blacks for the Board staff, and the Court cannot see where the plaintiffs were discriminated against on the basis of their race.

Based on the foregoing findings of fact and conclusions of law, the defendants are entitled to prevail in this action. A Judgment, conforming with this Memorandum Opinion, approved as to form by counsel for all parties, shall be submitted to the Court within the time and in the manner provided for by the Local Rules of this Court.

Biloxi, Mississippi
July 9th, 1979

/s/ Walter L. Nixon, Jr.
United States District Judge

Barbara PHILLIPS, Cornell Green Rice, Melvin Phillips, and Mississippi Council on Human Relations, a corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

The JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE AND EXPENDITURE REVIEW OF the STATE OF MISSISSIPPI et al., Defendants-Appellees.

The MISSISSIPPI COUNCIL ON HUMAN RELATIONS, a corporation, Barbara Phillips, Melvin Phillips and Cornell Green Rice, individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

The BOARD OF TRUSTEES OF the INSTITUTION OF HIGHER EDUCATION a/k/a The State College Board et al., Defendants-Appellees.

Barbara PHILLIPS, Melvin Phillips and Cornell Green Rice, individually and on behalf of a class, Plaintiffs-Appellants,

v.

The STATE OF MISSISSIPPI AGRICULTURAL AND INDUSTRIAL BOARD et al., Defendants-Appellees.

Nos. 79-2131, 79-2940 and 79-3550.

United States Court of Appeals, Fifth Circuit.

Unit A

Feb. 23, 1981.

Rehearing Denied April 27, 1981.

Employment discrimination actions were brought against three state agencies. The United States District

Court for the Southern District of Mississippi, William Harold Cox and Walter L. Nixon, Jr., JJ., denied motions for recusal, denied most motions for class certification, and entered judgment on the merits in favor of the defendants and plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that: (1) evidence of statements made by district judge in prior cases involving racial discrimination did not provide basis for recusal; (2) class certification was improperly denied; (3) racial discrimination on a class basis on the part of one employer was established; and (4) racial discrimination was shown in a number of the individual cases.

Affirmed in part and reversed and remanded in part.

1. Judges (Key) 51(4)

If affidavit of recusal is timely and technically correct, its factual allegations must be taken as true; judge must pass on legal sufficiency of the affidavit but may not pass on the truth of the matters alleged. 28 U.S.C.A. § 144.

2. Judges (Key) 51(3)

Affidavit of recusal is legally sufficient if the facts are material and stated with particularity, the facts are such that they would convince a reasonable person that bias exists if they are true, and the facts show that the bias is personal as opposed to judicial in nature. 28 U.S.C.A. §§ 144, 455.

3. Judges (Key) 51(4)

Under statute requiring a judge to disqualify himself in any proceeding in which his impartiality might be reasonably questioned, judge need not accept all the allegations by moving party as true and, in fact, no motion at

all is required; the judge must disqualify himself if the facts cast doubt on his impartiality regardless of how or by whom they are drawn to his attention. 28 U.S.C.A. § 455.

4. Judges (Key) 49(1)

The alleged bias of a judge must be personal as distinguished from judicial in nature in order to require recusal. 28 U.S.C.A. §§ 144, 455.

5. Judges (Key) 49(1)

Motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant case or in related cases nor on a demonstrated tendency to rule in any particular way nor on any particular judicial leaning or attitude derived from his experience on the bench. 28 U.S.C.A. §§ 144, 455.

6. Judges (Key) 49(1)

The fact that a judge's remarks or behavior take place in the judicial context does not exclude them from scrutiny and from requiring recusal if they reflect such pervasive bias and prejudice as would constitute bias against one of the parties. 28 U.S.C.A. §§ 144, 455.

7. Judges (Key) 49(2)

Where most of the allegations of bias concerned the trial judge's rulings or comments on the merits in previous cases, where some of the older remarks reflecting racial reactions which were outmoded and improper were not gratuitous insults and did not show overt hostility, and where all of the allegations concerned the judge's final conclusions or immediate reactions on points of law or facts in the case before him, they did not require recusal. 28 U.S.C.A. §§ 144, 455.

8. Federal Courts (Key) 819
Judges (Key) 51(4)

Recusal motion is committed to the sound discretion of the district judge and on appeal it will be asked only whether he has abused his discretion. 28 U.S.C.A. §§ 144, 455.

9. Federal Civil Procedure (Key) 184

Where neither party could determine how many black applicants there were, let alone identify all of them, and where the class included future and deterred applicants who were necessarily unidentifiable, joinder was impracticable even if the number was small. Fed.Rules Civ.Proc. Rule 23(a)(1), 28 U.S.C.A.

10. Federal Civil Procedure (Key) 171

Requirement that the district court decide whether to certify a class in any case as soon as possible after the commencement of the action is a command to the district court, not to the parties, and the court has an obligation to make the determination on its own motion if necessary. Fed.Rules Civ.Proc. Rule 23(c)(1), 28 U.S.C.A.

11. Federal Civil Procedure (Key) 164

Fact that plaintiffs had delayed in making motion to certify the case did not show that they would be inadequate class representatives, especially where a good deal of the time had been consumed in litigating motions for change of venue and for recusal.

12. Federal Civil Procedure (Key) 171

Even if attorney for plaintiffs would be disqualified from representing the class, it does not follow that the class may not be certified; court may make certification

contingent on replacement of counsel or on severance of the individual claim of the offending class representative.

13. Federal Civil Procedure (Key) 164

Fact that one of the named plaintiffs was an attorney for the civil rights law firm representing the plaintiff, although she was not acting as an attorney in the case, did not preclude class representation on the theory that she was an inadequate representative because of a potential conflict with other class members where any attorney fees granted in the case would come directly from the defendants and not from any fund created for class relief. Civil Rights Act of 1964, § 706(k) as amended 42 U.S.C.A. § 2000e-5(k).

14. Federal Civil Procedure (Key) 184

Where named plaintiffs did not seek to represent a class consisting exclusively of persons who had been deterred from making applications because of the racial policies of the employer, but, rather, also sought to represent unsuccessful applicants, the named plaintiffs could represent the persons who had been deterred from applying.

15. Federal Courts (Key) 858

District court's finding of nondiscrimination is a determination of ultimate fact to which the clearly erroneous standard does not apply.

16. Civil Rights (Key) 44(1)

Evidence that general population of the state was 37.2% black, that total civilian work force was 29.8% black, that 31.6% of the persons registering at the state Employment Security Commission for professional jobs

were black, that 27.8% of those registering for clerical or sales jobs were black, and that the percentage of blacks at one employer was between 1.5% and 6.5% black made out a prima facie case of discrimination.

17. Civil Rights (Key) 13.11

Named plaintiffs who all had college degrees lacked constitutional standing to challenge legality of employer's educational requirements for a college degree for certain positions.

18. Civil Rights (Key) 44(1)

Evidence of disparity between number of blacks in the work force and the number of blacks hired by employer, evidence of employer's history of discrimination in not having hired a single black during its first three decades of existence, and evidence that hiring procedures relied heavily on subjective judgments of executives from personal interviews demonstrated discrimination against blacks.

19. Civil Rights (Key) 9.10

Whether subjectivity in hiring is necessary or not, subjective judgments are suspect as job qualifications when they are exercised by members of an all white executive or supervisory staff.

20. Civil Rights (Key) 46

In view of past discrimination against blacks by state agency, court should direct the agency to set goals of approximately 20% black employment, separately for clerical and nonclerical positions, should require it to undertake an aggressive campaign of recruitment and advertising to procure sufficient qualified black applications,

and should, until those goals were achieved, require that one-third of all persons hired within a predetermined six-month period for permanent clerical or nonclerical jobs be black.

21. Civil Rights (Key) 43, 44(1)

To raise a prima facie case of employment discrimination, plaintiff must show that he belongs to a racial minority, that he applied and was qualified for job which the employer was seeking applicants, that he was rejected despite his qualifications, and that the position remained open after his rejection; burden then shifts to the employer to show some legitimate, nondiscriminatory reason for the applicant's rejection; plaintiff is then afforded an opportunity to show that the employer's stated reason is, in fact, a pretext.

22. Civil Rights (Key) 44(1)

Employer bears the burden of showing a legitimate reason for rejection of minority applicant by a preponderance of the evidence.

23. Civil Rights (Key) 44(1)

Evidence of employer's belief that black applicant had taken another position did not rebut a prima facie showing of employment discrimination where the employer claimed that an immediate decision to hire the applicant had been made but the employer procrastinated for several weeks without making an offer and where the evidence showed that race was a consideration.

24. Civil Rights (Key) 44(1)

Fact that black applicant had indicated that he left his previous position because it required excessive travel

was insufficient to rebut a prima facie case of discrimination against the black applicant on the theory that he had expressed a reservation about job-related travel where the employer described the travel requirements to the applicant but did not ask him if the travel requirements would be excessive.

25. Civil Rights (Key) 44(1)

In view of evidence that it was the routine practice of the employer to make no effort to further contact "walk-in" applicants, black walk-in applicant did not establish that denial of employment was due to racial discrimination.

26. Civil Rights (Key) 44(1)

Evidence established that black applicant was not qualified for any vacant position.

27. Civil Rights (Key) 44(1)

Evidence that, during the year following black applicant's application, only one white applicant was hired for position for which the black applicant might have been qualified and that the white applicant was more qualified demonstrated that black applicant had not been discriminated against on the basis of race.

28. Civil Rights (Key) 9.10

"Vacancy" within the meaning of the *McDonnell Douglas* test need not exist on the precise day of the application; any vacancies within a reasonable time must be considered as well.

See publication Words and Phrases for other judicial constructions and definitions.

29. Civil Rights (Key) 44(1)

Evidence that white was hired as a secretary scarcely two months after black secretary applied and absence of evidence that white was more qualified established that black was discriminated against because of her race.

30. Civil Rights (Key) 44(1)

Establishment of liability on class claim of employment discrimination operates to establish a prima facie case on behalf of each member of the class.

31. Civil Rights (Key) 44(1)

Evidence that, after employer obtained necessary federal funds for position which it intended to offer black applicant, it was informed that the black applicant had moved to another city to resume her law studies and that it then abandoned its plans for the new job demonstrated that the failure to hire the black applicant was based on a belief that she was no longer interested in employment and not racial discrimination.

32. Civil Rights (Key) 44(1)

Belief that black applicants were available for employment for only a short period of time based on the fact that they took other employment did not rebut prima facie case of racial discrimination.

33. Civil Rights (Key) 38

Black applicant for a job is not required to either remain permanently unemployed or forfeit his cause of action for racial discrimination.

Frank R. Parker, Nausead Stewart, Jackson, Miss., for plaintiffs-appellants Barbara Phillips et al. in No. 79-2131.

Stewart & Parker, Nausead Stewart, Lawyers' Committee for Civil Rights Under Law, Jackson, Miss., McTeer, Walls, Bailey & Buck, Charles Victor McTeer, Greenville, Miss., for plaintiffs-appellants Miss. Council on Human Relations et al.

Ross, Hardies, O'Keefe, Babcock & Parsons, William Freivogel, Susan G. Litchtenfeld, Chicago, Ill., Nausead Stewart, Lawyers' Committee for Civil Rights Under Law, Jackson, Miss., for plaintiffs-appellants Barbara Phillips et al. in No. 79-3550.

James M. Ward, Sp. Counsel, Starkville, Miss., Hubbard T. Saunders, IV, Sp. Asst. Atty. Gen., A. F. Summer, Atty. Gen., State of Miss., Dept. of Justice, Jackson, Miss., for defendants-appellees Joint Leg. Committee et al.

Ed. Davis Noble, Jr., Asst. Atty. Gen., Bill Allain, Atty. Gen., Jackson, Miss., M. M. Roberts, Hattiesburg, Miss., for defendants-appellees Bd. of Trustees of Institution of Higher Ed. et al.

Bill Allain, Atty. Gen., Hubbard T. Saunders, IV, Sp. Asst. Atty Gen. Jackson, Miss., James M. Ward, Sp. Counsel, Starkville, Miss., for defendants-appellees State of Miss. Agricultural and Indus. Bd. et al.

Appeals from the United States District Court for the Southern District of Mississippi.

Before WISDOM, RUBIN and SAM D. JOHNSON, Circuit Judges.

WISDOM, Circuit Judge:

These appeals concern three allied lawsuits brought against Mississippi state agencies for employment discrim-

ination. The named plaintiffs are the same in the three cases: Barbara Phillips, Melvin Phillips (not related), and Cornell Green Rice.[1] All are black. In each case the plaintiffs sought to represent a class of black job applicants.

The defendant[2] in No. 79-2940 is the Joint Legislative Committee on Performance Evaluation and Expenditure Review ("PEER"), an arm of the Mississippi legislature with power to conduct performance evaluations, investigations, and critical examinations of all expenditures by any state agency. It is composed of five members of each House. It employs a staff of about twenty research analysts and clerical workers. Its offices are in Jackson.

The defendant in No. 79-2131 is the Mississippi Agricultural and Industrial Board ("A&I"), an agency created to promote industrial and agricultural development and tourism. Its members are the Governor, the Lieutenant Governor, the Speaker of the Mississippi House, four state legislators, three other state officials, and twenty-five public members appointed by the Governor. Among its functions are approval of industrial bond issues, study and recommendation of tax exemptions for Mississippi ports and harbors, and dissemination of tourist information. The Board employs a staff of sixty to eighty persons at its main office in Jackson.

The defendant in No. 79-3550 is the Board of Trustees of the Institutions of Higher Learning (commonly known as the College Board), the governing body for Mississippi's state universities and colleges. Its members are appointed

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1. The Mississippi Council on Human Relations was an original party plaintiff in all three cases. It was dismissed for lack of a real interest in the outcome in the PEER and A&I cases.

2. In all three cases there are also individual defendants: the members of each defendant board or committee, certain staff executives, and other present and former state officers.

by the Governor. The Board employs a staff of about eighteen financial analysts and clerical workers in Jackson. This suit concerns the Board's employment practices with regard only to that staff and not to the university system generally.

All three suits were brought as class actions in the Northern District of Mississippi, alleging racial discrimination in the defendants' employment practices in violation of Title VII of the Civil Rights Act of 1964 as amended.[3] The cases were transferred to the Southern District of Mississippi under 28 U.S.C. § 1404(a) (1976). Although the PEER and A&I cases were consolidated for some preliminary purposes, the three were tried separately.[4] In the PEER and A&I cases the plaintiffs moved for the district judge's recusal. The motions were denied, and this Court refused to issue a mandamus ordering recusal of the trial judge. *In re Phillips,* No. 76-4038 (5 Cir. Nov. 19, 1976). In the PEER and College Board cases, the court refused to certify the alleged classes. In the A&I case the court certified a class of all past black unsuccessful job applicants, but refused to broaden the class to include future black applicants or persons deterred from applying by A&I's alleged discriminatory practices or reputation. After full trials on the merits, the court granted judgments for the defendants on all claims.

On appeal, the plaintiffs contend (1) that the district judge erroneously refused to recuse himself in the A&I

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3. 42 U.S.C. §§ 2000e to 2000e-17 (1976). The complaints also cited *id.* §§ 1981, 1983. The plaintiffs appeal only on the Title VII judgments.

4. The PEER and A&I cases were assigned to Hon. William Harold Cox. U.S. Magistrate John R. Countiss presided over the trials and most other proceedings in the cases. Judge Cox adopted Magistrate Countiss's findings of fact and conclusions of law. The College Board case was assigned to and tried by Hon. Walter L. Nixon, Jr.

case;[5] (2) that the court improperly refused to certify classes in the PEER and College Board cases; (3) that the court improperly narrowed the class certified in the A&I case; and (4) that the court's judgments on the merits are legally incorrect or clearly erroneous. We affirm the district court's decisions as to recusal and as to some of the individual claims. We reverse, however, as to the remaining individual claims, as to the class certification issues, and as to the merits of the class claim in the A&I case.

I. RECUSAL

Barbara Phillips, acting on behalf of her co-plaintiffs, filed an Affidavit of Personal Bias and Prejudice in the A&I case, seeking the recusal of Judge William Harold Cox. Phillips's affidavit did not state any facts relating to any bias against any of the particular plaintiffs or in favor of any of the particular defendants in the case. Rather, she attempted to show that Judge Cox is prejudiced against all blacks and that he is hostile to civil rights suits. Some of her allegations are conclusory accusations, lacking in particularity. Others recite particular judicial rulings, quotations from written opinions, and alleged remarks from the bench, in five cases over Judge Cox's nineteen-year judicial career. Phillips also recited statistics concerning the frequency with which this Court has affirmed or reversed Judge Cox's rulings in civil rights cases.

[1, 2] There are two statutes governing recusal of federal district judges. 28 U.S.C. §§ 144, 455 (1976). Section 144 provides in part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit

5. As noted, the same judge refused recusal in the PEER case as well. The plaintiffs have chosen not to appeal that decision.

> that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

If an affidavit filed under section 144 is timely and technically correct, its factual allegations must be taken as true for purposes of recusal. The judge must pass on the legal sufficiency of the affidavit, but he may not pass on the truth of the matters alleged. *Berger v. United States,* 1921, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed 481; *Parrish v. Board of Commissioners,* 5 Cir. 1975, 524 F.2d 98, 100 (en banc), *cert. denied,* 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976); *Davis v. Board of School Commissioners,* 5 Cir. 1975, 517 F.2d 1044, 1051, *cert. denied,* 425 U.S. 944, 96 S.Ct. 1658, 48 L.Ed.2d 188 (1976); *United States v. Roca-Alvarez,* 5 Cir. 1971, 451 F.2d 843, 847-48. In *Parrish,* we stated that an affidavit is legally sufficient if it meets a three-part test:

> 1. The facts must be material and stated with particularity.
>
> 2. The facts must be such that, if true, they would convince a reasonable person that bias exists.
>
> 3. The facts must show the bias is personal, as opposed to judicial in nature.

524 F.2d at 100, quoting *United States v. Thompson,* 3 Cir. 1973, 483 F.2d 527, 528, *cert. denied,* 415 U.S. 911, 94 S.Ct. 1456, 39 L.Ed.2d 496 (1974).

[3] Congress rewrote the second statute, section 455, in 1974. Subsection (b) of that section lists a number of specific situations in which a judge must recuse himself; none apply here. Subsection (a), a more general provision, requires that

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Section 455, unlike section 144, does not stipulate a formal procedure by which it must be raised. Like section 144, however, it may be raised by motion. *Davis*, 517 F.2d at 1051. Substantively, the two statutes are quite similar, if not identical.[6]

[4-6] Under either statute, the alleged bias must be "personal", as distinguished from judicial, in nature. *Davis*, 517 F.2d at 1052; *Parrish*, 524 F.2d at 100; *Steering Committee v. Mead Corp.*, 5 Cir. 1980, 614 F.2d 958, 964-65; *United States v. Serrano*, 5 Cir. 1979, 607 F.2d 1145, 1150, *cert. denied*, 445 U.S. 965, 100 S.Ct. 1655, 64 L.Ed.2d 241 (1980); *Whitehurst v. Wright*, 5 Cir. 1979, 592 F.2d 834, 837-38; *Heppele v. Johnston*, 5 Cir. 1979, 590 F.2d

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6. To the extent that there is a difference, section 455 imposes the stricter standard: a movant under section 144 must allege facts to convince a reasonable person that *bias exists*, *Parrish*, 524 F.2d at 100, while under the broader language of section 455, he must show only that a reasonable person "would *harbor doubts* about the judge's impartiality", *Potashnick v. Port City Constr. Co.*, 5 Cir. 1980, 609 F.2d 1101, 1111 (emphasis added), *cert. denied* ..... U.S. ....., 101 S.Ct. 78, 66 L.Ed.2d 22 (1980). *See* Comment, Disqualification of Federal Judges for Bias or Prejudice, 46 U.Chi.L.Rev. 236, 243-50 (1978). *See also* Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv.L.Rev. 736, 745-50 (1973).

On the other hand, section 455, unlike section 144, does not require the judge to accept all allegations by a moving party as true. Indeed, the section requires no motion at all; the judge must disqualify himself if the facts cast doubt on his impartiality regardless of how or by whom they are drawn to his attention. *See Fredonia Broadcasting Corp. v. RCA Corp.*, 5 Cir. 1978, 569 F.2d 251, 254-57, *cert. denied*, 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1979). Section 144, by contrast, requires allegation by affidavit within a stringent time limit and allows a party only one such affidavit in any case. If a party could bind a judge by his factual allegations in a section 455 motion, free from the formal requirements and more demanding standard of proof of section 144, the result would be a virtual open season for recusal. *See* 46 U.Chi.L.Rev. at 250.

609, 613; *United States v. Archbold-Newball*, 5 Cir. 1977, 554 F.2d 665, 682, *cert. denied*, 434 U.S. 1000, 98 S.Ct. 644, 54 L.Ed.2d 496 (1973). The point of the distinction is that the bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case". *United States v. Clark*, 5 Cir. 1979, 605 F.2d 939, 942 (per curiam). Thus, a motion for disqualification ordinarily may not be predicated on the judge's rulings in the instant case or in related cases, nor on a demonstrated tendency to rule any particular way, nor on a particular judicial leaning or attitude derived from his experience on the bench. *United States v. Grinnell Corp.*, 1966, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778, 793; *Berger*, 255 U.S. at 31, 41 S.Ct. at 232; *Steering Committee*, 614 F.2d at 964; *Serrano*, 607 F.2d at 1150; *Clark*, 605 F.2d at 942; *United States v. Caicedo-Asprilla*, 5 Cir. 1980, 632 F.2d 1161, 1165.[7]

[7] Here, most of Phillips's allegations concern Judge Cox's rulings or comments on the merits in previous cases. Some of them are misleadingly quoted out of context. At times, especially in some of the older instances, his remarks reflected racial reactions not only outmoded but improper. These remarks were unseemly, and we do not condone them. Nevertheless, they are not enough to require recusal. The comments alleged are not gratuitous insults and do not show overt hostility or the like; in every instance they concern the district judge's final conclusions or immediate reactions on points of fact or law in the

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7. The single fact that a judge's remarks or behavior take place in a judicial context does not exclude them from scrutiny if they reflect "such pervasive bias and prejudice . . . as would constitute bias against a party". *Davis*, 517 F.2d at 1051; *Whitehurst*, 592 F.2d at 838. *See also United States v. Ritter*, 10 Cir. 1976, 540 F.2d 463 (per curiam), *cert. denied*, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976).

case before him. We would be reluctant, in any but an extreme case, to base a disqualification order on such allegations. It is a district judge's duty to conduct trials, weigh evidence, consider the law, exercise his discretion, and reach decisions in the cases on which he sits. If he understands that a seemingly harsh comment toward a party or an attorney, or a perceived tendency to give severe sentences to some class of offenders, or an aggregate imbalance in victories for plaintiffs or defendants in a particular class of cases may subject him to a train of successful recusal motions in future cases, he may consciously or subconsciously shape his judicial actions in ways unrelated to the merits of the cases before him. Whether his conclusions in every case are the same as those that we (or these plaintiffs) would have reached is immaterial. A judge is not a computing machine, and the judicial system is not constructed so that each judge must reach the same result as all other judges in a given case. If a judge's "error" amounts to incorrect law or an abuse of discretion, appellate courts exist to correct it. Within that boundary, he not only may, but should, exercise his independent judgment on the facts and on the law. Presumably, for this attribute, among others, he was appointed. *See Serrano,* 607 F.2d at 1150-51; *United States v. Johnson,* 4 Cir. 1976, 537 F.2d 1170, 1175; *Baskin v. Brown,* 4 Cir. 1949, 174 F.2d 391, 394; B. Cardozo, The Nature of the Judicial Process 98-141 (1921); Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 73-74 (R. Pound, ed., 1964); Friendly, The Courts and Social Policy; Substance and Procedure, 33 U.Miami L.Rev. 21 (1978); Advisory Committee's Note, Fed.R.Evid. 201.

We do not mean to hold that prejudice against a class, as opposed to a particular litigant, can never form the basis for recusal. *See Davis,* 517 F.2d at 1051. Nor do we say

that a clearly evinced policy of disregarding the merits in any class of cases can withstand a recusal motion. *See United States v. Thompson*, 3 Cir. 1973, 483 F.2d 527, *cert. denied*, 415 U.S. 911, 94 S.Ct. 1456, 39 L.Ed.2d 496 (1974). *See also United States v. Clements*, 5 Cir. 1981, 634 F.2d 183. But we caution against a district judge disqualifying himself on the basis of an allegation of a perceived history of rulings that a moving party dislikes. This case provides a good example of the results that might follow. Phillips's affidavit contains nothing pertaining to the parties or subject matter of the A&I case; it could be repeated, word for word, by literally any black civil rights plaintiff from now until Judge Cox's retirement. With only minor modifications, it could be used by any black party—a black criminal defendant, say. This is a type of recusal for whole classes of cases, without the constitutional safeguards that protect a judge from removal from office save by impeachment. The Constitution does not contemplate that we dispense with a judge's service on such a grand scale on any but the most compelling showing. *See Steering Committee*, 614 F.2d at 966; *Archbold-Newball*, 554 F.2d at 682; *United States v. Partin*, 5 Cir. 1977, 552 F.2d 621, 637 n.20, *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977). Congress has provided another remedy for judicial intemperance. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Public Law 96-458, § 3, 96th Congress, 94 Stat. 2035, 2036 (1980), amending 28 U.S.C. § 372.

[8] We also do not suggest that Judge Cox was required *not* to recuse himself. Another judge, facing a similar question, might well decide the other way. A recusal motion is committed to the sound discretion of the district judge, and on appeal we ask only whether he has abused his discretion. *Davis*, 517 F.2d at 1052; *United States ex rel. Weinberger v. Equifax, Inc.*, 5 Cir. 1977, 557 F.2d

456, 463-64, *cert. denied*, 434 U.S. 1035, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978). We cannot say here that he has done so.

II. CLASS CERTIFICATION

The plaintiffs assert errors in all three cases concerning class certification. In the PEER case the district court refused to certify a class of unsuccessful past black applicants, future black applicants, and persons deterred from applying because of the Committee's reputation or history as an employer given to race discrimination. The court held that the purported class was not numerous enough under Fed.R.Civ.P. 23(a)(1). In the College Board case the court refused to certify a similar class on the ground that the plaintiffs did not show that they could adequately represent the class, in light of their delay in moving for class certification. In both cases the defendants assert an alternative ground for the court's refusal: an alleged conflict of interest between the plaintiffs' counsel and the purported class. The A&I case presents the issues differently. There the court certified a class of actual black applicants but refused to include future applicants and deterred persons, citing problems of numerosity, delay in moving, and lack of nexus between the named plaintiffs and the excluded persons. We find that none of the asserted reasons justify the court's decisions to refuse certification or to narrow the class certified.

A. Numerosity

The district court in the PEER case noted that the plaintiffs had met all the requisites for certification of a class under Rule 23(b)(2), except the requirement of Rule 23(a)(1) that the class be so numerous that joinder of all members is impracticable. Since PEER did not record the race of its applicants, it is impossible to tell exactly how many black applicants there were. The plaintiffs

nonetheless established at a certification hearing that there were at least 33 such applicants; there may have been many more.[8]

[9] The problem before the district court, and now before us, is not simply to say whether 33 class members are enough or too few to satisfy Rule 23(a)(1). Ample case law can be cited to show that smaller classes have been certified and larger ones denied certification for lack of numerosity. *See* 3B J. Moore & J. Kennedy, Federal Practice ¶23.05 (2d ed. 1980). Such number comparisons miss the point of the Rule. The proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors. Here, neither party can even count how many black applicants there are, let alone identify all of them. Moreover, the alleged class includes future and deterred applicants, necessarily unidentifiable. In such a case the requirement of Rule 23(a)(1) is clearly met, for "joinder of unknown individuals is certainly impracticable". *Jack v. American Linen Supply Co.*, 5 Cir. 1974, 498 F.2d 122 (per curiam); *Jones v. Diamond*, 5 Cir. 1975, 519 F.2d 1090, 1100; *see* B. Schlei & P. Grossman, Employment Discrimination Law 1095-97 (1976).

The same reasoning holds true in the A&I case, where the district court cited numerousity as a ground for ex-

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8. The defendants tentatively identified eleven unsuccessful black applicants, based on the recollection of PEER executives or on the fact that some applicants graduated from predominantly black universities or colleges. Nausead Stewart, an attorney for the plaintiffs, testified that she was personally acquainted with eight other applicants and knew them to be black. Finally, fourteen black applicants were identified by comparing PEER's applicant list with a voter registration list for the City of Jackson. The court accepted the figure 33. 3 Record at 73. There may have been many more. Any black applicant who attended an integrated college, who did not register to vote in Jackson, and who did not know Stewart would not have been identified as black.

cluding future and deterred applicants from the class certified. Moreover, aside from the inherent impracticability of joinder of such parties, there is the fact that the court did certify a class of actual applicants. It is hard to see how a class already numerous enough can become insufficiently numerous through the inclusion of an unknown number of additional members. *See Hebert v. Monsanto Co.*, 5 Cir. 1978, 576 F.2d 77, 80, *vacated on other grounds*, 580 F.2d 178 (5 Cir. 1978).

B. Delay

[10] Rule 23(c)(1) commands the district court to decide whether to certify a class in any case "as soon as practicable" after commencement of the action.[9] The district court invoked the principle of that rule in refusing to certify a class in the College Board case, finding that the plaintiffs had delayed too long in moving for class certification. This lapse, it held, warranted denial of the motion because it cast doubt on the plaintiffs' ability to represent the class adequately. *See East Texas Motor Freight v. Rodriguez*, 1977, 431 U.S. 395, 404-05, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453, 463. Similarly, the court cited delay as a reason for narrowing the class in the A&I case.[10]

[11] We think the court went too far in both cases. Neither *East Texas Motor Freight* nor any other precedent

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9. Rule 23(c)(1) is cast as a command to the district court, not the parties; hence, a district court has an obligation to make the determination on its own motion if necessary. *Gore v. Turner*, 5 Cir. 1977, 563 F.2d 159, 165; *United States v. United States Steel Corp.*, 5 Cir. 1975, 520 F.2d 1043, 1052, *cert. denied*, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976); *Garrett v. City of Hamtramck*, 6 Cir. 1974, 503 F.2d 1236, 1243; *Castro v. Beecher*, 1 Cir. 1972, 459 F.2d 725, 731.

10. This, of course, is inconsistent with the court's certification of the narrowed class in the A&I case. Since we conclude that delay would not justify a complete refusal to certify either the lesser or the greater class, we need not decide how best to resolve the inconsistency.

that we have found has held that delay in moving for certification is sufficient in itself to disqualify a party as a class representative. The case would be different if the plaintiffs' motion had been untimely under an applicable local rule, but here there was no such rule.[11] Although the plaintiffs doubtless could have been more diligent in making their motion, in the circumstances of these cases we do not think their delay was so inexcusable as to render their representation inadequate. The record reflects that a good deal of the time was consumed in litigating the defendants' motions in all three cases for a change of venue, the plaintiffs' motions in two cases for recusal, and the plaintiffs' attempt to obtain mandamus relief in this Court on the recusal issue. The rest of the time was spent in extensive discovery, much of which was relevant to the class certification question. Accordingly, we find that the district court was too draconian in refusing certification on this ground.

C. Conflict of Interest

[12] The defendants in the PEER and College Board cases raise another ground for noncertification, one not relied on by the district court.[12] This Court has adopted a per se rule under Canon 9 of the Code of Professional Responsibility[13] that an attorney who is the partner or spouse of a named class representative is disqualified from acting as counsel for the class. *Zylstra v. Safeway Stores, Inc.*, 5

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11. S.D.Miss. Local Rule 18, requiring that plaintiffs move for class certification within 45 days of the filing of the last answer, had not been adopted at the time of trial.

12. The district court has expressly rejected this contention in a related case. *Mississippi Council on Human Relations v. Mississippi Dept. of Justice*, Civil No. J76-118(R) (S.D.Miss.) (Opinion of June 18, 1980, on motion to disqualify counsel).

13. "A lawyer should avoid even the appearance of professional impropriety."

Cir. 1978, 578 F.2d 102, following *Kramer v. Scientific Control Corp.*, 3 Cir. 1976, 534 F.2d 1085, *cert. denied*, 429 U.S. 830, 97 S.Ct. 90, 50 L.Ed.2d 94 (1976). In the PEER and College Board cases, counsel for the plaintiffs are the Lawyers' Committee for Civil Rights Under Law and two of its attorneys. Barbara Phillips, one of the three named plaintiffs in the two cases, is one of the attorneys for the Lawyers' Committee (although she is not acting as an attorney in these cases). Accordingly, the defendants argue, if the class were certified the Lawyers' Committee would be disqualified as counsel. For that reason, they say the plaintiffs are not adequate class representatives under Rule 23(a)(4).[14]

[13] Although we agree wholeheartedly with the rule announced in *Zylstra* and *Kramer*, we hold that it does not apply here. Our holding in *Zylstra* is an exception to our general rejection of per se rules under Canon 9 in *Woods v. Covington County Bank*, 5 Cir. 1976, 537 F.2d 804. The *Zylstra* rule is directed at a particular ethical problem: the potential conflict that arises when a class representative stands (or appears to stand) to gain financially from an award of attorney's fees made out of a class fund. Put simply, the cause for concern is that the class representa-

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14. The defendants' attempted use of the *Kramer-Zylstra* rule requires something of a leap in logic. *Kramer* and *Zylstra* both involved motions to disqualify counsel. Each of the cases before us, by contrast, involves a contention that a would-be class representative should not be allowed to serve. As the *Kramer* Court noted, the issues raised in the two contexts are "related, but not identical. . . . [One] relates to who may serve as class representative, while the [other] relates to who may serve as counsel." 534 F.2d at 1088. Supposing that the Lawyers' Committee is disqualified from representing the class under *Zylstra*, it does not necessarily follow that the class may not be certified. For example, the district court could make certification contingent on replacement of counsel or on severance of the individual claim of the offending class representative. We need not reach this problem, however, since we hold that the Lawyers' Committee may properly represent the classes.

tive may be too generous with the class's money in granting a fee to his own partner or spouse. *See Zylstra*, 578 F.2d at 104; *Kramer*, 534 F.2d at 1089-90, 1091; *id.* at 1093 (Rosenn, J., concurring). Here the problem does not arise. Any attorney's fee granted in these cases will come directly from the defendants under 42 U.S.C. § 2000e-5(k) (1976), and not from any fund created for class relief; hence, Ms. Phillips would never have the opportunity for overgenerosity.

D. Nexus

[14] The district court in the A&I case concluded that it should exclude from the plaintiff class persons deterred by A&I's policies from applying there because the named plaintiffs lack any "nexus" with deterred persons. The court reasoned that, since the named plaintiffs did apply to A&I, they have no standing to represent persons whose grievance is that they have been prevented from applying.

This ground for narrowing the class is faulty as a matter of law. The argument would be sound if these plaintiffs sought to represent a class consisting *exclusively* of deterred persons; in such a case the plaintiffs would lack standing to represent the putative class, in the same sense that a high school graduate lacks standing to bring a class action challenging a high school requirement. *Payne v. Travenol Laboratories, Inc.*, 5 Cir. 1978, 565 F.2d 895, 898-99, *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); *see East Texas Motor Freight v. Rodriguez*, 1977, 431 U.S. 395, 403-04, 97 S.Ct. 1891, 1897, 52 L.Ed.2d 453, 461-63. Here, however, the plaintiffs are members of the class they seek to represent, and the only issue is the breath of the definition of that class. The requirement that the named plaintiffs' claims be "typical" of the claims of the class,

Fed.R.Civ.P. 23(a)(3), does not mean that all claims must be identical. Rather, a named plaintiff who has allegedly suffered from the defendant's racial discrimination may bring an "across the board" class action to represent all persons who have suffered from the same discriminatory policies, whether or not all have experienced discrimination in the same way. *Satterwhite v. City of Greenville*, 5 Cir. 1978, 578 F.2d 987, 993-94 n.8 (en banc), *vacated on other grounds*, 445 U.S. 940, 100 S.Ct. 1334, 63 L.Ed.2d 773 (1979), *Hebert v. Monsanto Co.*, 5 Cir. 1978, 576 F.2d 77, *vacated on other grounds*, 580 F.2d 178 (1978); *Long v. Sapp*, 5 Cir. 1974, 502 F.2d 34; *Johnson v. Georgia Highway Express*, 5 Cir. 1969, 417 F.2d 1122. Hence, we have approved the practice of allowing rejected applicants to represent classes including those deterred from applying. *E. g., Jack v. American Linen Supply Co.*, 5 Cir. 1974, 498 F.2d 122 (per curiam). Indeed, if this were not the case, most such persons would go without relief entirely, since it is unlikely that one of them would sue and qualify as a class representative.

Because the district court erred in refusing to certify any class in the PEER and College Board cases, we remand them for trial as to the class allegations.[15] The A&I case went to trial as a class action. It does not appear that the court's error in restricting the class scope could have affected the trial in any important way. We therefore reach the class merits in that case.

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15. Despite counsel's statement to the contrary, it is apparent from the record that the court in each case conducted the trial solely as an action on the named plaintiffs' individual claims, and that evidence pertaining to class allegations was excluded. PEER Transcript at 17-18; College Board Transcript at 21, 44, 49. We therefore decline to reach the class merits of these cases.

III. THE MERITS: THE A&I CLASS ACTION

[15] In reviewing the merits of the case as to alleged class discrimination, we keep in mind that the district court's finding of nondiscrimination is a determination of ultimate fact to which the "clearly erroneous" standard of review does not apply. (We are bound, of course, by the district court's findings of subsidiary fact and judgments of credibility unless they are clearly erroneous.) Fed.R.Civ. P. 52(a); *Williams v. Tallahassee Motors, Inc.*, 5 Cir. 1979, 607 F.2d 689, 690; *East v. Romine, Inc.*, 5 Cir. 1975, 518 F.2d 332, 338-39; *Causey v. Ford Motor Co.*, 5 Cir. 1975, 516 F.2d 416, 420-21.

The record indicates that the A&I Board employed no blacks from its inception in 1942 through 1972. In 1973 the first black was hired to form and head a new subunit, the Office of Minority Business Enterprise (OMBE). According to a stipulated set of employee lists, the Board employed five blacks in December 1974 (7.9 percent of the Board's total); eleven blacks in December 1975 (12.0 percent); fifteen blacks in December 1976 (17.6 percent); and thirteen blacks in 1977 (12.5 percent). These figures are skewed, however, by the inclusion of the OMBE staff and short-term employees hired under the federal Comprehensive Employment and Training Act (CETA).[16] Both programs derive most of their funds from federal sources. OMBE has its own hiring procedure, separate from the rest of the Board.[17] Its staff has always been

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16. Pub.L.No.93-203, 87 Stat. 839 (1973), later codified at 29 U.S.C. §§ 801 to 999 (Supp. III 1979).

17. There is much dispute between the parties as to whether OMBE is really "part of" A&I. The point is unimportant. Thomas Espy, the OMBE director, did all the hiring for OMBE (subject to the approval of the executive director), while Harold Cross,

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all or nearly all black. The record does not reflect how CETA employees are hired, but their positions are temporary. The CETA program is subject to closer federal scrutiny as to equal employment practices than is A&I's employment generally. Excluding these persons, the figures are much lower; one black (1.5 percent) in 1974; one black (1.4 percent) in 1975; seven blacks (9.5 percent) in 1976; and six blacks (6.5 percent) in 1977. Even these statistics hide another key fact: although roughly half of the Board's staff is professional, technical or managerial, A&I has never hired a black permanent employee (outside of OMBE) for anything but a clerical position.

Most of the real debate between the parties concerns the relevant labor market to which A&I's hiring statistics are to be compared.[18] Actual applicant flow, often the

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Footnote continued—

administrative assistant to the executive director, hired the staff for all other parts of A&I (likewise subject to approval). Thus, whether or not OMBE is operationally part of A&I, we cannot consider it as all of a piece with the rest of the Board for purposes of evaluating the fairness of A&I's hiring procedures.

18. Besides the problem of which demographic measurement best suits the case, there is disagreement as to the proper geographical area. Here, perhaps, is where a purely numerical analysis fails most visibly. There is never any ascertainable demarcation line showing from where a particular employer can or cannot draw employees. Whether a potential employee will commute or relocate to take a job depends not only on his personal tastes, but also on the types of work he does, prevailing economic conditions, the features of the two communities concerned, and any number of other factors. Moreover, the problem is inevitably complicated by the effect of the employer's own recruiting and hiring practices. *See generally Hazelwood School District v. United States*, 1977, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768.

In this case, the parties dispute whether the proper area is the entire state or only the Jackson Standard Metropolitan Statistical Area. The relevant figures, however, are remarkably close for both areas in nearly all important measures. The only substantial difference is that blacks make up a higher fraction of applicants for white collar jobs (professional, technical, managerial, clerical, and sales) in the Jackson area than in the state at large.

best measurement, is unavailable here because A&I does not identify its applicants by race. Other statistical measures are necessarily imperfect in differing ways and varying degrees. The best the court can do is to accept what figures are available; allow for imperfections, skewing factors, and margins of error; and then take the figures for what they are worth. Sometimes this is much, sometimes little. *See United Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 340, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396, 418; *Williams*, 607 F.2d at 693; *Hester v. Southern Ry.*, 5 Cir. 1974, 497 F.2d 1374, 1379-81.

[16] The general population of Mississippi was 37.2 percent black at the time of the 1970 census. According to figures from the Mississippi Employment Security Commission, the total civilian work force was 29.8 percent black in 1977. In February 1978, 31.6 percent of persons registering at that Commission for professional, technical, or managerial employment were black; 27.8 percent of registrants for clerical or sales jobs were black. Although these statistics have their flaws, we think the disparity between them and the Board's hiring record is sufficient to raise a prima facie case of class discrimination and to shift the burden to the Board to show that the discrepancy results from other causes. *Robinson v. Union Carbide Corp.*, 5 Cir. 1976, 538 F.2d 652, 659-61, *modified on other grounds*, 544 F.2d 1258 (5 Cir. 1977), *cert. denied*, 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977).

[17] A&I's only substantial response is to point out that only 11.5 percent of all high school graduates in the Mississippi work force were black (as of 1973, the latest year for which figures are in evidence).[19] This is material,

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19. Actually, the defendants state that 14.9 percent of such graduates are black. Appellees' Brief at 12. This is due to the Board's misreading of the M.E.S.C. table, Plaintiffs' Exhibit 32 at table 6: what that table states is that 14.9 percent of Mississippi

(Continued on following page)

but, by itself, it is insufficient. Many of A&I's clerical positions do not require a high school diploma, according to the Board's own job descriptions. Moreover, almost all of the nonclerical positions require a college degree; blacks made up 18.1 percent of the Mississippi work force with degrees. Considered against the figure for A&I's black nonclerical hiring—zero, outside of OMBE—that figure does much to deflate the rebuttal argument.[20]

[18, 19] Even so, we might hesitate to find discrimination in this case on the basis of these statistics alone. Here, however, there are other indicators. The district court found that A&I has a clear history of discrimination, not having hired a single black during its first three decades of existence. Its hiring procedures rely heavily on the subjective judgments of its executives from personal interviews, a procedure that can easily be used to mask racially motivated hiring decisions.[21] Such facts can buttress sta-

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Footnote continued—

blacks in the labor force are high school graduates. The error becomes more serious with regard to college graduates: the Board reports that only 3.7 percent of Mississippi college graduates are black, but a little long division shows that the correct figure is 18.1 percent.

20. Because the named plaintiffs all have college degrees, they lack constitutional standing to challenge the legality of A&I's educational requirements under *Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, and *Scott v. City of Anniston*, 5 Cir. 1979, 597 F.2d 897, *cert. denied*, 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980). *See Payne v. Travenol Laboratories, Inc.*, 5 Cir. 1978, 565 F.2d 895, 898-99, *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978). Accordingly, that issue is not presented in these cases, either here or in the district court.

21. To note this fact is not necessarily to find fault with A&I's procedure or job criteria. In fact, the Board's bulky set of job descriptions is about as detailed and specific as can reasonably be expected. Given the nature of A&I's work, some subjectivity in hiring is unavoidable, especially with regard to nonclerical positions. Whether necessary or not, however, subjective judgments are suspect as job qualifications when they are exercised by members of an all-white executive or supervisory staff. *See Jenkins v. Caddo-Bossier Ass'n for Retarded Children*, 5 Cir. 1978, 570 F.2d 1227, 1229 (per curiam).

tistical evidence by suggesting a qualitative explanation for a quantitative result.

[20] In light of these facts, as found by the district court and amply supported by the record, we conclude that the district court erred in its conclusion of nondiscrimination against the class. On remand, the district court should direct the Board to set goals of about twenty percent black employment outside OMBE, separately for clerical and nonclerical positions. A&I should undertake an aggressive campaign of recruitment and advertisement to procure sufficient qualified black applicants to make these goals feasible. Further, until these goals are achieved, one third of all persons hired within predetermined six-month periods for permanent clerical or nonclerical jobs outside OMBE shall be black. The district court shall take any other concurrent or later actions necessary to eliminate the effects of past discrimination at A&I and to procure the rights of the plaintiff class and its members. *See Morrow v. Crisler*, 5 Cir. 1974, 491 F.2d 1053 (en banc), *cert. denied*, 419 U.S. 895, 95 S.Ct. 173, 42 L.Ed.2d 139 (1979); *Franks v. Bowman Transportation Co.*, 5 Cir. 1974, 495 F.2d 398, 418-20, *rev'd in part on other grounds*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *NAACP v. Allen*, 5 Cir. 1974, 493 F.2d 614; *Davis v. County of Los Angeles*, 9 Cir. 1977, 566 F.2d 1334, 1342-44, *vacated as moot*, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979); *United States v. City of Chicago*, 7 Cir. 1977, 549 F.2d 415, 436-37, *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1978); *Boston Chapter, NAACP, Inc. v. Beecher*, 1 Cir. 1974, 504 F.2d 1017, 1026-28, *cert. denied*, 421 U.S. 910, 96 S.Ct. 1561, 43 L.Ed.2d 775 (1975); *United States v. Masonry Contractors Ass'n*, 6 Cir. 1974, 497 F.2d 871, 877; *Erie Human Relations Commission v. Tullio*, 3 Cir. 1974, 493 F.2d 371; *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission*, 2 Cir. 1973,

482 F.2d 1333, 1339-41, *cert. denied*, 421 U.S. 991, 95 S.Ct. 1997, 44 L.Ed.2d 481 (1975); *Carter v. Gallagher*, 8 Cir. 1971, 452 F.2d 315, 330-31 (en banc), *cert. denied*, 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972).

IV. THE MERITS: THE INDIVIDUAL CLAIMS

[21, 22] The standard and order of proof in an individual claim under Title VII are by now familiar. To raise a prima facie case, the plaintiff must show (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) that, after his rejection, the position remained open. The burden then shifts to the employer to show some legitimate, nondiscriminatory reason for the applicant's rejection.[22] The plaintiff is then afforded a fair opportunity to show that the employer's stated reason is in fact a pretext. *McDonnell Douglas Corp. v. Green*, 1973, 422 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668; *Furnco Construction Co. v. Waters*, 1978, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957. This formula must not be applied mechanically, but flexibly, with a view toward the particular hiring procedures and factual situation presented. *McDonnell Douglas*, 411 U.S. at 802, 93 S.Ct. at 1824; *Peters v. Jefferson Chemical Co.*, 5 Cir. 1975, 516 F.2d 447, 450. On

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22. This Court has consistently held that the employer bears the burden of showing his legitimate reason by a preponderance of the evidence. *Burdine v. Texas Department of Community Affairs*, 5 Cir. 1979, 608 F.2d 563, 567; *Turner v. Texas Instruments, Inc.*, 5 Cir. 1977, 555 F.2d 1251, 1255; *Whiting v. Jackson State University*, 5 Cir. 1980, 616 F.2d 116, 121; *Jefferies v. Harris County Community Action Ass'n*, 5 Cir. 1980, 625 F.2d 1025, 1030. The Supreme Court has granted certiorari on the question, however. *Texas Department of Community Affairs v. Burdine*, 447 U.S. 920, 100 S.Ct. 3009, 65 L.Ed.2d 1112 (1980). We, of course, adhere to the Fifth Circuit rule pending the Supreme Court's decision, but it is not a matter of importance; under our view of the cases, none of the nine individual claims present turn on the applicability or nonapplicability of the *Burdine* rule.

appellate review, we are bound by the district court's findings of credibility and of subsidiary fact unless they are clearly erroneous. The clear error standard, however, does not apply to the ultimate conclusion of discrimination or nondiscrimination. *Williams v. Tallahassee Motors, Inc.*, 5 Cir. 1979, 607 F.2d 689, 690; *East v. Romine, Inc.*, 5 Cir. 1975, 518 F.2d 332, 338-39; *Causey v. Ford Motor Co.*, 5 Cir. 1975, 516 F.2d 416, 420-21.

A. The PEER Case

[23] 1. *Barbara Phillips.* Barbara Phillips applied to the PEER Committee on July 12, 1974. She had interviews with John Hamilton, the Director of the Committee staff, and John Turcotte, a staff auditor. Both men testified that they were very favorably impressed with Phillips's credentials, her manner, and her knowledge of PEER's functions.[23] At their request, she brought in a writing sample. The two men decided right away to hire Phillips, but they did not inform her of that. After the initial interview, Phillips was never told that she was under serious consideration.[24] Three weeks after their interview with her, Hamilton and Turcotte saw reports on television and in a newspaper that Ms. Phillips had filed EEOC complaints against PEER and other agencies and that she was acting as a consultant to the Mississippi Council on Human Relations.[25] The district court found that she would have been hired but for these news reports. Hence, it concluded, PEER established a legitimate reason for not hir-

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23. Transcript at 114, 188-89, 397-98. Usually we do not give transcript and record citations. We make an exception in this case for the convenience of this Court, should there be a petition for a rehearing en banc, and for the convenience of the Supreme Court, should there be an application for a writ of certiorari.

24. Transcript at 128, 188, 345, 400.

25. Transcript at 114-16, 128, 430-31.

ing Phillips—Hamilton's and Turcotte's beliefs that she was already employed. The court also held that Phillips had not shown that reason to be a pretext.[26]

After carefully examining the record, we believe that this finding is clearly erroneous. The defendant's theory fails because it cannot adequately explain why, if Hamilton and Turcotte were so impressed with Ms. Phillips's qualifications that they decided immediately to hire her, they procrastinated for several weeks. In fact, the record shows that race was very much on their minds. Hamilton testified that hiring Phillips was "an important decision" because she would have been the first black employee at PEER. He and Turcotte were concerned about the reaction of the white legislators on the Committee and the white staff to such a step, as well as Phillips's own reaction to the "alien world" of the white-dominated agency. The reason for the delay, both men testified, was that they were mulling over the "significance" or "complexities" of hiring blacks at PEER.[27] One need not question the good faith of Hamilton and Turcotte to conclude that the ultimate decision not to hire Ms. Phillips was as much due to her race as was the delay in offering her a position. Given their enthusiasm for her qualifications, it is hard to believe that they would not have at least inquired as to the possibility of hiring her away from her "consulting" position but for their apprehensions about her race.[28] We do not mean to say that Title VII always requires an employer to pursue black applicants even after they are hired elsewhere. We hold only that, on the record in this case, we cannot avoid the conclusion that the reason offered was a convenient

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26. Record at 676-77.

27. Transcript at 113, 118-19, 128-29, 144, 346-47, 362; *see* id. at 210, 262-63.

28. Her position was, in fact, unpaid. Transcript at 224-25.

way out of an uncomfortable decision—in other words, a pretext.

[24] 2. *Melvin Phillips.* Melvin Phillips applied to PEER on August 30, 1974. John Turcotte interviewed him. When he called back the next day he was told that there were no openings. The district court found that Turcotte rejected Mr. Phillips because he had expressed a reservation during the interview about job-related travel.[29]

This finding is clearly erroneous. There is literally no evidence that Mr. Phillips said in his interview that he was unwilling to travel. On the contrary: although Turcotte testified that he had told Phillips about the travel requirements of the job, he was certain that Phillips had not expressed any reservation about them.[30]

Presumably, what the district court had in mind was Mr. Phillips's statement on his employment application that he had left his last job because it required excessive travel[31] Turcotte testified that it was this expression of reluctance that had led to the decision not to hire Phillips.[32] If this was indeed the reason for the rejection, it is insufficient as a matter of law to rebut Phillips's prima facie case. Turcotte's reason was, at best, a bare assumption about Phillips's intentions at the time of his application—an assumption made all the more unreasonable by Phillips's silence about the travel requirements Turcotte described to him and Turcotte's failure to ask the obvious question. We have held that an unchecked assumption that an ap-

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29. Record at 672. The court also noted that the next person hired, Susan Hymel, was better qualified than Phillips. This is immaterial, since Turcotte testified that the hiring of Hymel was not at all connected with the rejection of Phillips. Transcript at 441.

30. Transcript at 463-64.

31. Defendants' Exhibit 2; *see* Transcript at 327.

32. Transcript at 412, 415.

plicant would not accept a job cannot be a legitimate reason for failing to offer the job, or at least to make inquiry about the assumption. *Davis v. Jackson County Port Authority*, 5 Cir. 1980, 611 F.2d 577. Here, in fact, Phillips testified that he had not said anything about travel because he was unemployed and needed the job to support his family. He later took a job requiring travel.[33]

3. *Cornell Green Rice.* On September 19, 1974, Cornell Rice visited PEER's offices to apply for a clerical or secretarial job. She left a completed (although unsigned) application form with a receptionist, but she did not speak with anyone else or set up an interview. She never called back or made any further effort to keep in contact with PEER.

[25] The district court found that Rice did not make out a prima facie case because there were no vacancies for which she was qualified. This is probably incorrect.[34] Even so, it is clear from the record that the defendants showed a valid, nondiscriminatory reason for not hiring Rice. According to the uncontradicted testimony of Turcotte and Hamilton, it was routine practice at PEER to make no effort to make further contact with "walk-in" applicants—those who do nothing more than leave or mail in a resume or application form.[35] Rice's attempt to impeach this explanation by counterexample only reinforced it.[36] It is not for us to say whether this procedure is sen-

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33. Transcript at 331, 483.

34. As we shall discuss later, a vacancy within the meaning of the *McDonnell Douglas* test does not mean only an opening existing at the precise date of application, but any opening during the time that the application remains active. The record shows that two white secretaries were hired within two months of Rice's application. Record at 185-86.

35. Transcript at 178-79, 454-55; *see id.* at 135.

36. Transcript at 452-55.

sible, or even fair; it is sufficient for our purposes that it is race-neutral and that it has not been shown to be pretextual. Accordingly, we decline to disturb the district court's ruling on this claim.

B. The College Board Case

1. *Barbara Phillips.* On July 9, 1974, Barbara Phillips went to the receptionist's desk on the first floor of the building in which the Board's offices are located. She took an application form home, filled it out, and mailed it in. Ten days later, Dr. E. E. Thrash, the Board's executive director, sent her a letter stating that there were no vacancies for a person of Phillips's qualifications.

[26] We find no clear error in the district court's finding that Ms. Phillips was not qualified for any vacant position. The Board employs a staff of about 18 persons; most of its work concerns the financial problems of Mississippi higher education. Thrash testified that he rejected Phillips because there was nothing in her application to suggest that she had any experience or expertise in financial matters or in higher education.[37] Her education had been in history and in law, proficiency at which would not qualify her for any of the Board's professional positions.[38] Nor did she appear to be qualified for most clerical jobs, since she left blank the space on her application for typing and shorthand skills.[39] She was qualified, Thrash testified, for the position of file clerk, but that job has not been open since before 1974.[40] We believe that this evidence provides adequate support for the district court's ruling.

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37. Transcript at 72, 76, 94; Plaintiffs' Exhibit 13.

38. Transcript at 72-74, 76, 94, 98. The Board handles none of its own legal work. *Id.* at 94-95.

39. Plaintiffs' Exhibit 13; Transcript at 72, 79.

40. Transcript at 74, 79.

2. *Melvin Phillips.* Melvin Phillips testified that he went to the College Board on September 6, 1974. A receptionist informed him that there were no application forms, but he had an informal interview with Charles Coffman, an associate director. Coffman, Phillips said, told him that there were no openings then and that there were no positions for persons with B.A. degrees.[41]

The district court rejected Mr. Phillips's testimony and found that he had not applied to the Board. This was error. This finding rests on a misreading of Coffman's testimony; indeed, the parties stipulated in the pretrial order that Phillips did apply.[42]

[27] Despite this discrepancy, we affirm the district court's ruling. Examination of the record reveals that, during the year following Mr. Phillips's application, only one white applicant was hired in a position that Phillips might have filled. That one, Ward Shaw, had a master's degree in economics and experience as a college instructor. He was hired on a temporary basis to do a study of the feasibility of certain proposed program additions at Alcorn State University, a job for which he was better qualified than Phillips.[43] Given this absence of any relevant vacancies, we must agree that Phillips did not make out a prima facie case of racial discrimination.

3. *Cornell Green Rice.* Cornell Rice interviewed with Thrash on September 19, 1974. He told her that there were no jobs open then and would be none in the foresee-

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41. Transcript at 213-15.

42. Record at 735. Coffman did not testify that he never interviewed Mr. Phillips, but only that he did not recall doing so. He pointed out that he interviews many applicants and easily might not remember one in particular. Transcript at 265-66.

43. Plaintiffs' Exhibit 4; Transcript at 77, 96-97.

able future. She left her resume and application. She never heard from the Board.[44]

[28, 29] The district court found that Rice was not hired because there were no vacancies when she applied.[45] This is clearly erroneous. The evidence shows that Bonnie Childers, a white, was hired as a secretary scarcely two months after Rice's application.[46] The defense made no attempt to show that Childers was better qualified than Rice, and there is no indication of how long the vacancy she filled had existed.[47] A vacancy, within the meaning of the *McDonnell Douglas* test, need not exist on the precise day of application; any vacancies within a reasonable time must be considered as well.[48] *McLean v. Phillips-Ramsey, Inc.*, 9 Cir. 1980, 624 F.2d 70, 72 (per curiam); *Neely v. City of Grenada*, 1977, N.D.Miss., 438 F.Supp. 390, 409; *see East v. Romine, Inc.*, 5 Cir. 1975, 518 F.2d 332, 338. Since no attempt was made to show a legitimate reason for hiring Childers instead of Rice, we hold that Rice is entitled to judgment.

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44. Transcript at 227-28.

45. Record at 920. The court also adverted to testimony that Robert Harrison, a black member of the Board, had approached Rice about working at the Board and that Rice had said she was not interested. It is not clear how much the court relied on that fact, but any reliance would have been misplaced. The evidence shows that, when Harrison approached Rice, she was earning more than the Board would pay. At the time of her application, by contrast, she was unemployed. Transcript at 137-40, 227.

46. Plaintiffs' Exhibit 4.

47. Childers's application is in the record, Record at 392, but it is not obvious that her credentials or experience exceed Rice's. She was not mentioned at trial. Through an apparent clerical error, the departure date for the person Childers replaced is plainly misreported. Record at 559, 569.

48. There is at least one example on the record, occurring a few months before Rice's application, of a white applicant being hired months after applying. Plaintiffs' Exhibit 3 (Martha D'Aquino).

C. The A & I Case

[30] The individual claims in the A & I case come to us in a different posture from those in the other two cases because of our holding that the plaintiffs proved that A & I is guilty of discrimination against the plaintiff class.[49] The establishment of liability on the class claim operates to establish a prima facie case on behalf of each member of the class. Once the individual plaintiff proves that he applied unsuccessfully, the burden shifts to the employer to establish that its failure to hire that individual was the result of legitimate nondiscriminatory reasons. *International Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 357-62, 97 S.Ct. 1843, 1865-68, 52 L.Ed.2d 396, 428-32; *Franks v. Bowman Transportation Co.*, 1976, 424 U.S. 747, 771-73 & n.32, 96 S.Ct. 1251, 96 S.Ct. 1267-68 & n.32, 47 L.Ed.2d 444, 466-67.

[31] 1. *Barbara Phillips.* Barbara Phillips visited the A & I Board during July 1974. She testified that she was interviewed by Harold Cross, administrative assistant to the director, but other evidence shows (and the district court found) that Phillips actually spoke with Robert Robinson, the executive director.[50] Robinson testified that he was very impressed with Phillips's credentials and intelligence, but that he had no positions at that time suitable for her. He offered to assist her in obtaining a job at another agency. At the same time, however, he described to her a new position that he wanted to create in the Industrial Department, for which he thought Phillips would be well suited. He took two telephone numbers

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49. We also note that in this case, unlike the other two, there is no claim for backpay or other money relief. The complaint is expressly limited to a cause of action for injunctive and declaratory relief, and neither party introduced any evidence as to the propriety or amount of backpay awards.

50. Record at 456; Transcript at 58, 145-46, 160-62.

for her and asked her to check back. Over the next three weeks Robinson worked at arranging federal funds for the new position. When he succeeded, he called Phillips's telephone number to speak to her about the job. At one there was no answer; at the other, he was told that Phillips had moved to Chicago to resume her law school studies at Northwestern University. He abandoned his plans for the new job.[51]

The district court credited Robinson's testimony and found that the sole reason why Phillips was not hired was because Robinson believed she was no longer interested in employment in Jackson. There is abundant evidence to support this finding. In light of the facts, it is not clear that Phillips was rejected at all. Even if she was, we agree with the district court that Robinson's testimony adequately established a legitimate, nondiscriminatory reason for the rejection.[52]

2. *Melvin Phillips.* Melvin Phillips applied at the A & I Board on August 28, 1974. After filling out an application, he spoke briefly with Harold Cross. Cross said there were no jobs available in A & I, but referred him to Thomas Espy, head of OMBE. Espy also had no jobs. Phillips called Espy a few times, but he never heard from A & I again.[53]

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51. Transcript at 160-62, 164.

52. This holding is not in conflict with *Davis v. Jackson County Port Authority*, 5 Cir. 1980, 611 F.2d 577, or our holding on Melvin Phillips's claim in the PEER case. In those cases the employers jumped to unwarranted conclusions while foregoing obvious opportunities to ask about them. The difference here is simply a matter of reasonableness; there is a point at which Title VII does not require an employer otherwise acting in good faith to verify every possible logical assumption on which he might rely. We are influenced in this determination by Robinson's remarkable efforts to create a position for Phillips when he found none available.

53. Transcript at 72-80.

[32, 33] The district court held against Phillips because, it concluded, he was only available for employment for a short period of time, and all white applicants hired during that period were better qualified than he.[54] We think that the court improperly constricted its scrutiny of the Board's hiring. Title VII does not require a plaintiff to remain permanently unemployed or forfeit his cause of action for racial discrimination. Nor can the Board contend here, as it did in the case of Barbara Phillips, that Phillips's apparent departure from the job market was a legitimate reason for not hiring him, for there is no evidence that anyone at A & I ever learned that he had taken another job. According to A & I's own written procedures and Cross's testimony, applicants remain under active consideration for all openings within a year of the date of application.[55] During the year following Phillips's application, A & I hired seventeen non-clerical employees, fourteen of whom were white. Excluding OMBE and temporary CETA appointments, they hired four such persons, all white.[56] A & I's failure to show a legitimate business reason for hiring these persons instead of Phillips is fatal to its defense.

3. *Cornell Green Rice.* Cornell Rice applied at A & I on September 18, 1974, and interviewed briefly with Espy. He said he would refer her application "upstairs" (i. e., to A & I). She later received a letter from Espy advising her that there were no jobs available.[57]

Rice's case is similar to Melvin Phillips's. The district court ruled against Rice because it found that she had been available for employment for only a few days, and

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54. Record at 458-59.

55. Plaintiffs' Exhibit 18; Transcript at 87-88, 150-51.

56. Plaintiffs' Exhibit 8.

57. Plaintiffs' Exhibit 1; Transcript at 23-27, 47-48.

there were no secretarial or clerical vacancies during that time. Again, though, there was no suggestion that Rice's application was removed from consideration prematurely, for no one at A & I knew of her new job. During the year following her application, A & I hired nineteen whites and six blacks in clerical jobs. If OMBE and CETA jobs are excluded, the figures are nine white, one black.[58] As with Melvin Phillips, the absence of any business justification for these hirings defeats the Board's rebuttal of the prima facie case established under *Franks* and *Teamsters*.

SUMMARY

To summarize our disposition of these cases:

We AFFIRM the judgment in the A & I case with regard to the issue of recusal.

We REVERSE the district court's refusal to certify the alleged classes in the PEER and College Board cases. Those cases are REMANDED for appropriate proceedings as to the administration of the class action and the merits of the class allegations. We MODIFY the class certification order in the A & I case to include in that class future applicants and persons deterred from applying for jobs with A & I.

We REVERSE the judgment in the A & I case that the plaintiffs did not establish discrimination against the class. The case is REMANDED for appropriate relief consistent with this opinion.

We REVERSE the court's judgments on the merits with respect to Barbara Phillips's individual claim in the PEER case; Melvin Phillips's individual claims in the PEER and A & I cases; and Cornell Rice's individual claims

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58. Plaintiffs' Exhibit 8.

in the A & I and College Board cases. We REMAND the cases for appropriate relief. We AFFIRM the district court's judgments as to the remaining individual claims.

Although we have refused to overturn the district court's denial of the plaintiffs' recusal motion, in light of later developments and all of the circumstances presented in these cases, we suggest that any proceedings on remand should be heard before a judge other than the Hon. William Harold Cox. We do so without in any way questioning the integrity or impartiality of that Judge; we act solely in the interest of preserving the complete appearance of impartiality. *See Webbe v. McGhie Land Title Co.*, 10 Cir. 1977, 549 F.2d 1358, 1361; *Eckles v. Sharman*, 10 Cir. 1977, 548 F.2d 905, 911; *United States v. Bray*, 10 Cir. 1976, 546 F.2d 851, 860; *United States v. Ritter*, 10 Cir. 1976, 540 F.2d 459, 464-65, *cert. denied*, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976).

Opposition

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No. 81-155

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

BOARD OF TRUSTEES OF INSTITUTIONS OF HIGHER EDUCATION, et al.,
Petitioners,

v.

MISSISSIPPI COUNCIL ON HUMAN RELATIONS, BARBARA PHILLIPS, CORNELL GREEN RICE and MELVIN PHILLIPS, Individually and on Behalf of a Class,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-155

BOARD OF TRUSTEES OF INSTITUTIONS
OF HIGHER EDUCATION, et al.,

Petitioners,

v.

MISSISSIPPI COUNCIL ON HUMAN RELATIONS,
BARBARA PHILLIPS, CORNELL GREEN RICE
and MELVIN PHILLIPS,
Individually and on Behalf of a Class,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

This brief is submitted by respondents, who were appellants in the court below, in opposition to the Petition for Certiorari in this case.

STATUTE AND RULE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a)(1), provides:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire . . . any individual . . . because of such individual's race . . . ."

Rule 23 of the Federal Rules of Civil Procedure provides in relevant part:

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> * * *

"(c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. . . ."

STATEMENT

This is an action for racial discrimination in employment against the Board of Trustees of State Institutions of Higher Learning. The Board governs the public university system of the State of Mississippi. At issue is the allegedly discriminatory refusal of the Board to hire blacks at its central office in Jackson, Mississippi, where its staff at the time of suit included the Executive Secretary and Director and eighteen educational and financial analysts and clerical workers. Although the

population of Mississipi is 35 percent black, the Board had never employed a black in its central office until almost two months after the Council on Human Relations in July 1974 filed with the Equal Employment Opportunity Commission one of the charges on which this action is based.

The action was filed late in 1975 as an action on behalf of a class consisting of unsuccessful past black applicants for employment, future black applicants and persons deterred from applying by the Board's discriminatory reputation. In February 1976 respondents initiated discovery and requested additional time to move for class certification. Petitioners meanwhile moved to transfer the action from the District Court for the Northern District of Mississippi to the

District Court for the Southern District of Mississippi, and in July 1976 the motion was granted. Additional discovery was conducted in the transferee court, and on July 25, 1978, at the time of a pretrial conference, Respondents moved to certify the class. The district court denied certification on the ground that respondents' delay in filing their motion was inconsistent with the requirement of Fed. R. Civ. P. 23(c)(1) that the court determine as soon as practicable after the commencement of an action whether an action is to be maintained as a class action, and that the delay meant that respondents had not shown that they could adequately represent the class in satisfaction of the prerequisite to a class action stated in Fed. R. Civ. P. 23(a)(4).

(Pet. App. A3-A4.)*/ The claims of three individual plaintiffs were tried soon after the denial of class certification.

Of the three respondents' claims, only one remains in issue, that of Cornell Green Rice. She is a black who holds a college degree in business education and has worked as a secretary and teacher. On September 19, 1974, she submitted her

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*/ Petitioners say that the district court declined to certify the class on the further ground that the class was not so numerous as to make individual joinder impracticable. Fed. R. Civ. P. 23(a)(1). (Pet. 3.) No such ground appears in the district court's opinion, and the court of appeals did not treat the issue in its discussion of this case. Petitioners present only the question whether delay justified the denial of class certification. (Id. at i.) In any event, the court of appeals' discussion of the point in a related case consolidated for decision below and now here as No. 81-181 would be sufficient to dispose of the issue were there any such issue in this case. (Pet. App. A36-A38.)

application and resume to the Board and was interviewed by the person responsible for making offers of employment. Ms. Rice was advised that no positions were open and none would be open in the foreseeable future. A white woman was hired as a secretary about two months later, a fact that the district court ignored or overlooked, and Ms. Rice was not contacted for that position or any other. (Pet. App. A55.) Only a short time earlier, another white woman had been hired months after submitting her application to the Board. (Id. n.48) The district court nevertheless dismissed Ms. Rice's claim on the ground that she had failed to prove that positions were available when she applied. (Pet. App. A14.) It also ruled against the other two Respondents,

also blacks, who had applied unsuccessfully to the Board for jobs. (Pet. App. A14-A15.)

The court of appeals reversed the denial of class certification on the ground that, in the circumstances of this case, a two and one-half year delay in moving for class certification did not in itself render respondents inadequate class representatives. It also reversed the ruling as to Ms. Rice. It held that the availability of a position for which Ms. Rice, a member of a racial minority, applied and for which she was qualified (no issue of her qualification was raised) was shown by the hiring of a white applicant as a secretary shortly after Ms. Rice applied. Thus, a prima facie case of discrimination was established, and no

explanation of the presumptively discriminatory failure to hire Ms. Rice was even attempted. (Pet. App. A55.) The court affirmed the denial of the claims of the other two plaintiffs. (Pet. App. A53-A54.)

ARGUMENT

The petition presents no issues that warrant review by this Court. So far as the class certification issue is concerned, nothing more is involved than a disagreement between the court of appeals and the district court over the legal significance of a delay in moving for certification and the reasons for the delay, reasons that resided in the particular circumstances of this case. The issue is of no possible importance except to the parties. So far as the ruling on

Ms. Rice's individual claim is concerned, the court of appeals ruled that evidence overlooked or ignored by the district court compelled the conclusion that Ms. Rice had made a prima facie case of discrimination that petitioners did not rebut or even try to rebut and so was entitled to judgment. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 101 S. Ct. 1089, 1094 (1981). On the other hand, because the court of appeals perceived evidence to sustain the district court's decision that there was no discrimination against two other plaintiffs, it affirmed the district court's judgment as to them. (Pet. App. A53-A54.)

1. If this Court were to take on certiorari every case in which a court of

appeals differs with a district court on the legal significance of unquestioned facts, it would have no time for any other kind of case. Such a difference is all that the class certification question presented by petitioners is about. The court of appeals determined that in the circumstances of this case the respondents' failure to move for class certification before the pretrial conference did not in itself establish that they were inadequate class representatives. The special circumstances included the absence of a local rule setting a deadline for class certification motions, the time consumed in litigating a motion for transfer and the extensive discovery that was conducted, much of which related to class certification.

The district court characterized respondents' delay in moving for class certification as a violation of the letter or spirit of Fed. R. Civ. P. 23(c)(1). (Pet. App. A3-A4.) But there is no doubt that the court of appeals was correct in ruling that Rule 23(c)(1) is addressed not to the parties but to the district court (Pet. App. A38); the court is directed to make a determination as to class certification as soon as practicable. (P. 3, supra.) Moreover, if regarded as addressed to the parties -- in letter or in spirit -- Rule 23(c)(1) establishes no inflexible deadline. The timing of a party's motion and the court's decision on class certification may be affected by a variety of factors such as the complexity of the issues, the need

for discovery, the existence of sub-classes and other factual circumstances, and the procedural devices used by the court in reaching its decision. Wright & Miller, Federal Practice and Procedure: Civil § 1785 (1972).

This Court's decision in East Texas Motor Freight v. Rodriguez, 431 U.S. 395, 405 (1977), does indeed establish that a failure to move or a delay in moving for class certification may bear on whether named plaintiffs will adequately represent the class they profess to represent. Here, the court of appeals took full account of the rule of the Rodriguez case. It considered respondents' delay in moving for class certification as it bore on whether they qualified as adequate class representatives under Rule 23(a)(4).

However, it found, contrary to the district court, that the delay was explicable by reference to the circumstances and did not prove that respondents could not adequately represent the class. (Pet. App. A39.) There is no reason for further review of an issue that is most unlikely to recur and cannot recur in the district court where the case was tried because there is now a local rule fixing a time for making class certification motions. (Pet. App. A39 n.11.)

2. The court of appeals decided this case before this Court decided Texas Department of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981). It used language in its opinion that is vaguely evocative of the question the Court has undertaken to review in Pullman Standard v. Swint, No. 80-1190, and

United Steelworkers v. Swint, No. 80-1193. There is, however, not the slightest inconsistency with Burdine, and any similarity to Swint is purely verbal and fades away on analysis. There is no reason to remand for further consideration in the light of Burdine or to hold the case for Swint.

a. Burdine concerns the extent to which an employer must go to rebut the presumption raised by a prima facie case of discrimination. Here that point was not reached. The district court held that Ms. Rice did not establish a prima facie case because of its mistaken belief that there were no vacancies while her application was pending. The court of appeals, on the basis of the subsequent hiring of a white applicant for a job for which Ms. Rice was qualified, evidence of

which the district court had overlooked or ignored, held that a prima facie case was established -- as clearly it was.

It is quite true that the court, speaking of the white applicant who was preferred to Ms. Rice, said that "the defense made no attempt to show that Childers [the white applicant] was better qualified than Rice . . . ." (Pet. App. A55.) It is also true that in Burdine this Court held that to rebut a prima facie case an employer need not prove that the person hired was better qualified than the person not hired. 101 S. Ct. at 1096-97. But the use by the court of appeals of language to which it was accustomed but that was subsequently disapproved by this Court is beside the point. The point is that the employer made no effort to prove anything about

the hiring of Childers or her qualifications that would overcome the presumption of discrimination raised when Ms. Rice completed her prima facie case by proving that, after she was not hired, the "position remained open and the employer continued to seek applicants from persons of [her] qualifications." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).*/

The court of appeals had no doubt that this was the correct view of the case. It recognized that its rule that an employer bore the burden of rebutting

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*/ The court of appeals said that it was not obvious from Childers' application "that her credentials or experience exceed Rice's." (Pet. App. A55 n.47.) That the employer hires such a person after passing over the minority applicant is proof as near conclusive as proof ever is of the final element of the McDonnell Douglas prima facie case.

a prima facie case by a preponderance of the evidence was under review in the Burdine case and might be disapproved. But it said that none of the individual claims in this case and consolidated companion cases turned on that point. (Pet. App. A48 n.22.)

Petitioners' effort to bring their case within a remark this Court made in Furnco Construction Co. v. Waters, 438 U.S. 567, 576 (1978), is idle. There, dealing with an employer that did not accept applications at the job site and complainants who appeared at the job site gate to try to get themselves hired, the Court said the complainants "did everything within their power to apply for employment." That was to say that those complainants had done all they could to satisfy the second requirement of

McDonnell Douglas. It was not meant to add to the burden of proof of a formal job applicant such as Ms. Rice, who does all that is required of her when she submits her application and is interviewed for a job.

b. There is no Swint issue here. The court of appeals unambiguously held that the critical district court finding that barred Ms. Rice's claim was clearly erroneous.

> "The district court found that Rice was not hired because there were no vacancies when she applied. This is clearly erroneous." (Pet. App. A55.)

That is the most explicit compliance with Rule 52(a). The court of appeals did, in a preliminary general discussion applicable to this case and two companion cases, reiterate the position it has

consistently taken that it is bound by the plain error standard when it comes to issues of credibility and findings of subsidiary fact but not as to the ultimate conclusion of discrimination or nondiscrimination. (Pet. App. A48-A49.) Only the first part of that general introductory comment was relevant here. The district court's ultimate conclusion of no discrimination was left without any support when its key subsidiary finding was eliminated as clearly erroneous. It had to be reversed whatever standard governed. There is no reason to hold this case pending decision in the Swint cases.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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